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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 262.

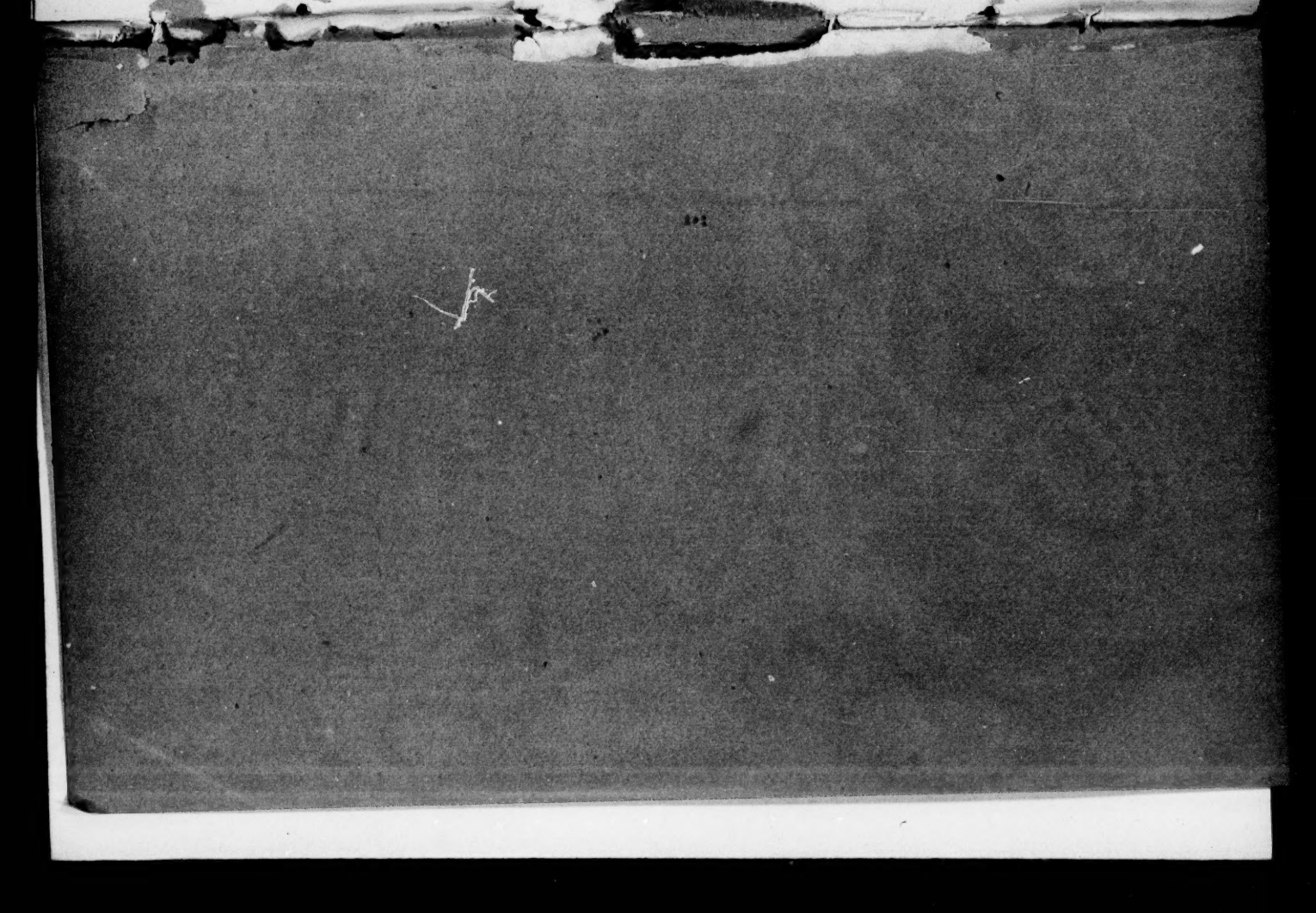
LEWIS H. MEYER AND WILLIAM DENNISON, TRUSTEES, APPELLANTS,

vs.

THE WESTERN CAR COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

FILED OCTOBER 10, 1877.



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1 Pleas in the circuit court of the United States of America in and for the district of Iowa, at a term thereof began and holden at the United States court-room in the city of Des Moines, and district aforesaid, on the second Monday of May, the same being the 14th day of May, A. D. 1877, before Hon. Samuel F. Miller, one of the associate justices of the Supreme Court of the United States, Hon. John F. Dillon, circuit judge for the eighth circuit and Hon. James M. Love, district judge for the district of Iowa.

1½ Be it remembered that heretofore, to wit, on the 4th day of May, A. D. 1875, Lewis H. Meyer, by Messrs. Grant & Smith, his solicitor', filed in the clerk's office of the circuit court of the United States for the district of Iowa, his bill of complaint against the Davenport & St. Paul Railroad Co. et al., which said bill of complaint is in the words and figures following, to wit:

2 Circuit court of the United States for the district of Iowa.

MOSES DEWITT LOOMIS
vs.
THE DAVENPORT & ST. PAUL RAILROAD COMpany & the Davenport Railway Construction Company & others.

To the judges of the circuit court of the United States for the district of Iowa:

1. Lewis H. Meyer, who avers that *his* is a citizen of the State of New York, brings this bill in equity against the Davenport & St. Paul Railroad Company, the Davenport Railway Construction Company, the Delaware Construction Company, citizens of the State of Iowa; William Dennison, a citizen of the State of Ohio; Abraham Bibby,
3 Andrew Munday, Benjamin Burch, surviving partner of B. & H. M. Burch; A. R. Jones, John L. Davies & Son, Beiderbeck & Miller, W. C. Wadsworth & Co., Francis W. French, R. Krause Childs & Co., L. Lowenstein & Co., Lovell, Corbett & Co., M. Foley; Benjamin Burch, J. H. Lakin, Wm. Burch, composing the firm of Burch, Lakin & Co.; Robert Valentyne & Jason L. Payne, Sarah E. Burch, administratrix of the estate of H. M. Burch, deceased, Charles M. Lockwood, Richard Moore, H. S. Babcock & Geo. H. French, his assignee, M. L. Rogers, First National Bank of Davenport, Hiram Price, Daniel Stevens, Richard Elwood, John Hornby, Lewis Beel, C. T. Peet, Lucias How-
4 ard, Brown & Martin, the Delaware Railway Construction Company, Leroy Jackson, S. Denton & Co., Westfal & Heins, Elizor Davis, J. H. Leach, E. Hoag, L. S. Davies, surviving partner of John L. Davies & Son, all citizens of the State of Iowa, & the Western Car Company, a citizen of the State of Ohio.

2. Said Meyers avers that on the day of , 1875, he was appointed a trustee of the mortgage or deed of trust hereinafter named in place of John Edgar Thompson, who was a trustee under said deed of trust, and who departed this life on the 22d of May, A. D. 1874.

3. Said Meyer avers that his appointment was in accordance with the powers conferred on the boudholders in a certain supplemental
5 mortgage made, executed, & delivered on the first day of July, A. D. 1871. A copy of said appointment is hereto annexed, marked Exhibit A.

4. That on 1st day of July, 1871, there was executed & delivered to William Dennison, a citizen & resident of the State of Ohio, and John Edgar Thompson, of the city of Philadelphia, State of Pennsylvania, a certain deed or indenture of mortgage, now shown to the court, a copy of which is hereto annexed and made a part hereof, marked Exhibit B, for the purpose of securing the payment of certain bonds, also executed & delivered by said company, to the amount of twenty thousand dollars per mile of the line of said company's road upon which the work
6 of grading, bridging, & tieing shall have been completed, & to be issued from time to time as the said road should progress, said bonds bearing interest at the rate of seven per centum per annum, free of United States taxes, payable semi-annually on the first days of January & July in each year at the company's agency, either in New York, London, or Frankfort. Said bonds, both principal and interest, is to be paid in gold coin.

5. Your petitioner aver that said bonds were of the denomination of one thousand dollars, & were to be payable to John Edgar Thompson, or bearer, on the first day of July, one thousand nine hundred & eleven (1911), in the city of New York, in United States gold coin, if or
7 equal to the present standard.

6. That by the terms of said mortgage only $20,000 per mile for each mile of main line of said road upon which the work of grading, bridging, & tieing should have been completed were to be issued, & the issue was to continue in that manner as the road progressed.

7. That only one hundred & twenty-four miles of the main line of said line of said road was graded, bridged, & tied from Duck Creek north of Davenport to Fayette, & the said railroad company & said construction company & said trustees, pretending that 150 miles had been so graded, bridged, & tied, issued and delivered to divers persons, of whom
8 the plaintiff is the trustee, three million of bonds, & in violation of said mortgage & its terms, issued afterwards, without grading & tieing any more than 124 miles, issued to certain other persons about four hundred & fifty thousand dollars in bonds, which your petitioner is informed are valid in the hands of the holders except those in the hands of Moses Dewitt Loomis, the original plaintiff in this suit.

8. That by said deed of trust or mortgage the said railroad corporation, to secure the payment of the principal & interest on said trust bonds, did grant, bargain, sell, & convey unto said parties of the second part & to their successor or successors as trustees, all & sin-
9 gular the road, bridges, & superstructure of the said Davenport & St. Paul Railroad, including all branches, side-tracks, additions, turnouts, right of way, depot grounds, coal lands, timber lands, & other lands then owned or thereafter to be acquired by said party of the first part, all depots, station-houses, grain-houses, engine-houses, car-houses, water-tanks, freight-houses, grain-elevators, wood-houses, coal-houses, car-shops, & machine-shops & all other buildings whatsoever, now erected or hereafter to be erected.

Also all kinds of machinery & tools now held & owned or hereafter to be acquired by said party of the first part for use in connection with
10 the said railroad, including all locomotives, tenders, cars, or other rolling-stock or equipment & all tools, implements, fuel, & materials of every kind used or procured for use in the constructing, operating, repairing, or replacing any part or parcel of said railroad or any part of its appurtenances; also all property & franchises connected with or relating to said railroad or any part of its business in any wise whatever which was held or thereafter to be acquired by the said party

of the first part, and also all rights, claims, & benefits in or to any lease, contract, or agreement now made or which may be hereafter made by the first party with any person or persons whomsoever.

Together with all & singular the tenements & appurtenances
11 thereto belonging or in any wise appertaining, & the reversions, remainders, tolls, incomes, rents, issues, & profits thereto.

And also all the estate, right, title, & interest whatsoever, as well at law as in equity, of the said party of the first part, of, in, to, or out of the same & every part & parcel thereof.

To have and to hold said railroad & property & appurtenances to said trustees & their successors in trust, and assigns, the following express trust, among others, that, in case the said the railway company should fail to pay said principal or any part thereof, or any of the interest or any part thereof, or any of the bonds secured or intended to be secured by the same, at any time when & where the same might become
12 due & payable, accordingly to the tenor thereof, & for sixty days thereafter, & if such default should continue for six months, then & in either case all of said bonds, both principal & interest, should thereupon become due & payable, & said trustees, their successor' or assigns, at their direction, & on the written request of the holders of one-fourth of said bonds then unpaid, should cause the said premises, or so much thereof as should be necessary to discharge said principal & interest of all the bonds unpaid, together with the expense of sale, to be sold at public auction in the city of New York, in the State of New York, after giving notice of the time & place of such sale by advertise-
13 ment published not less than once a week for six months in one or more newspapers in each of the cities of New York & Davenport, & upon such sale to execute a deed in fee simple conveying title to the purchaser.

And such trustees on such sale were authorized to pay the expenses of said sale, including a reasonable computation for their services & enough to indemnify themselves against liability arising from their trust, & pay the residue pro rata to the holders of said bonds, first, to the payment of interest, then to payment of principal, & if any residue to pay the same to the said debtor corporation.

14 9. That said deed of trust was duly recorded in the county of Scott, State of Iowa, December 24, A. D. 1872; Clinton Co., Iowa, June 12th, A. D. 1872; Jones County, Iowa, June 14, A. D. 1872; Clayton County, Iowa, June 3d, A. D. 1872; Delaware County, I'a, February 7, A. D. 1872; Fayette County, Iowa, February 8th, A. D. 1872; Howard County, Iowa, February 28th, A. D. 1872; Winneshiek County, Iowa, February 29, A. D. 1872; & in the office of the secretary of state, February 29, A. D. 1872.

10. That one the same day aforesaid, to wit, on the first day of
15 July, A. D. 1871, the said Davenport & St. Paul Railroad Company made, executed & delivered to the said John Edgar Thompson & William Dennison a certain other deed of trust or mortgage by way of supplement, a copy of which is hereto annexed, marked Exhibit C.

11. That said supplemental mortgage amended articles sixteen (16) of said first deed of trust, making it read as follows:

"Tenth. It is mutually agreed by & between the parties hereto that the words 'trustees' & 'trustee' respectively as used in these presents shall be construed to mean the persons who for the time being shall be charged with the execution of the trusts under these presents, w'ether such persons or person be the parties of the second part

hereto, or either of them, or successors or successor of the said parties of the second part, or either of them in said trust.

"And it is further mutually agreed that each of the said trustees shall be entitled to just compensation for any & all services which he shall hereafter render in his trust, to be paid by the said party of the first part, or out of the income of the trust property, and that neither of the trustees shall be responsible for the default or misconduct of the other, or for the default or misconduct of any agent appointed in persuance of these presents, if such agent be selected with reasonable care; & it is further agreed, that either of the said trustees may resign & be discharged from the performance of the trust created by these presents by giving notice in writing to the said party of the first part, & to his associate trustees, if there be such, of his intention to resign, to be served at least three months before the time limited therein for the taking effect of such resignation, and that the said trustees, or either of them, may be removed by the holders of the majority in interest of the whole amount of said bonds by an instrument in writing signed by such majority in interest.

"And it is further agreed that in case at any time hereafter the said trustees, or either of them, or any trustee hereinafter appointed, shall die, or resign or be removed as herein provided, or otherwise, or shall become incapable or unfit to act in said trust, a successor to such trustee shall be appointed by the holders of a majority in interest of the total amount of said bonds then outstanding by an instrument in writing duly executed by such holders, & in case a vacancy shall at any time occur in said trust by death, resignation, or otherwise, the surviving or continueing trustee shall be vested with all the rights, powers, & authorities granted by these presents to the said parties of the second part.

"And that upon the resignation or removal of any trustee & the appointment of another trustee in his place, all the estate & interest, rights, powers, and authorities under this indenture of the trustee so resigning or being removed shall be transferred to & become vested in the new trustee so appointed without any further assurance or conveyance; but the trustees so resigning or being removed shall, on request of the party of the first part or of the new trustee who may be appointed, immediately execute a proper deed, deeds of conveyance to vest in such new trustee all the estate & interest, rights, powers, & authorities which were vested in or held by such resigning or removed trustee under or by virtue of these presents."

12. Said supplemental indenture further provides—

"That no bond shall be valid or binding or be benefited by the provisions hereof unless the same shall be certified by the said trustees in the form aforesaid, & the said trustees shall not at any time certify or allow to be issued any bonds in excess of the rate of twenty thousand dollars for each mile of the said road upon which the work of grading, bridging, & tieing shall have been finished and completed, save as hereinafter provided."

13. Said supplemental indenture was duly signed, executed, & delivered by Geo. H. French, the president, & W. H. Price, the secretary, & attested by the seal of said Davenport & St. Paul Railroad Company, and the same was duly acknowledged by the said John Edgar Thompson & William Dennison, & duly recorded the sixteenth (16th) day of February thereafter in the office of the recorder in Scott County, Iowa, &, as your petitioner is informed, in the other counties through which said railroad is located.

14. And your petitioner further avers that said Davenport & St. Paul Railroad Company afterwards, to wit, on the first day of March, A. D. 1872, made, executed, & delivered a certain other supplemental deed of trust, a copy of which is hereto annexed, marked Exhibit D, and made a part hereof.

15. That among other things provided was this, that the said indenture first mentioned herein should be so amended that in lieu of
22 the ten' & sixteenth articles therein contained the said sixteenth articles shall be entirely omitted from said indenture, & said tenth articles as therein contained be amended so that the form of the bond provided for in said first mortgage or deed of trust of dated July 1st, 1871, be made to read as follows:

"The payment of this bond is secured by a mortgage or deed of trust bearing date July 1st, 1871, & by a deed of supplemental to & amendatory thereof bearing date March 1st, 1872, executed by said company on its road-bed, bridges, depot grounds & buildings, rolling stock, machinery, franchises, & all of its property of every kind, as also net incomes acquired & to be acquired to John Edgar Thompson, of
23 Pennsylvania, & William Dennison, of Ohio, trustees."

16. Said second supplemental indenture further provides that the trustees' certificate endorsed on said bonds shall be amended and made to read as follows, to wit:

"The undersigned hereby certify that this bond is one of the series of bonds described in & secured by the within-mentioned mortgage or deed of trust dated July 1st, A. D. 1871, & the deed supplemental to and amendatory thereto dated March 1st, A. D. 1872."

17. Said second supplemental indenture further provides that—

"No bond as aforesaid shall be valid or binding or be benefited
24 by the provisions hereof unless the same shall be certified by the said trustees in the form aforesaid, and that said trustee shall allow no issue in excess of the rate of twenty thousand dollars for each mile of the said road upon which the work of grading, bridging, & tieing shall have been finished & completed."

18. Other provisions are made in said second supplemental indenture, which may be seen by a reference to said Exhibit C.

19. Your petitioner further avers that three millions in amount of bonds secured by the said mortgages herein mentioned were issued & delivered to the said trustees, & by said trustees certified as by
25 said deed of trust required, & said railroad has been constructed as follows: commencing at a point near Pine Hill Cemetery, about four miles from the levee at Davenport; thence in a northerly direction to the town of Fayette, in the county of Fayette, a distance of about one hundred & twenty-four miles; also what is known as the branch called the Maquoketa branch, commencing at Eldridge, in the county of Scott and State of Iowa, & running northerly to Maquoketa, in the county of Jackson & State aforesaid; &, further, the grading is mostly completed from Fayette to the town of Cresco, county of Howard, State of Iowa; & that the bridging & tieing of the said road, the distance being
26 about forty-five miles, has partly completed.

20. Your petitioner avers that said defendant corporation on the first day of January, A. D. 1874, and ever since, has neglected to pay the interest on said three million four hundred & fifty thousand in amount of bonds, or any part thereof, & more than six months has elapsed since their failure to do so, & by reason thereof the whole of the principal of said bonds has become due & payable, & said petitioner

claim s the right conferred on them of makeing the payment thereof by the sale of said mortgaged property.

21. Your petitioner avers that said defendants ought to pay
27 what is due on said bonds for principal & interest, or otherwise release their equity of redemption in the premises, but they refuse so to do.

22. Your petitioner is advised that about four hundred & fifty thousand dollars in amount of bonds were afterwards issued with a like ce'tificate.

23. Your petitioner avers that the following parties, The Delaware R'y Construction Company, Western Car Company, Abraham Bibby, Andrew Munday, Benjamin Burch, Burch, Lykin & Co., Benjamin Burch, surviving partner of B. & H. M. Burch, Charles M. Lockwood, Richard Moore, H. S. Babcock, M. L. Rogers, First Na-
28 tional Bank of Davenport, Hiram Price, David Stevens, Richard Elwood, John Hornby, Lewis Beal, C. S. Peet, Leroy Jackson, S. Denton & Co., Elizor Davis, J. H. Leach, E. Hoag, claim some judgment or other *lein* on said property or some part of said mortgaged property, & some of them claim a lien subsequent & some prior to that of the plaintiff by virtue of said mortgage as amended, but your petitioner avers that his said mortgage-lien is prior to any of them. He prays that said defendants & each of them may answer & fully disclose what judgment or lien on said premises or any part thereof.

24. Your petitioner avers that said judgments & liens are not such as can be enforced against the bondholders, because the sale
29 & removal of the work done & materials furnished by said parties are impossible from the nature of the work done without the total destruction of the property annexed thereto, which is not included in or a part of the work done by the said plaintiffs in said judgments, & said judgments and sales were not rendered & made as required by the statu'es of Iowa.

25. That said William Dennison is nominally a party defendant to some of said judgments, but was served only by publication, & was litigating the said judgments in the Iowa courts as is authorized by law.

26. That the said William Dennison is not now performing the
30 duties of a trustee under said mortgage, having been removed.

27. That said judgment creditors may claim a right to redeem said mortgaged premises or a sale thereof.

28. That said Railway Construction, by an agreement (which is hereto annexed, marked Exhibit E), agreed with said bondholders that the subscriptions along the line of said road would grade, bridge, & tie the same ready for iron, & that the subscription was not sufficient; that said Davenport Railway Construction Company would do it, & said Railway Construction Company is bound to pay all of said claims, if paid.

30½ 29. That said Railway Construction Company also agreed, by contract with said Davenport & St. Paul Railroad Company, dated July, A. D. 1872, & a copy of which is hereto annexed, to furnish equipments for the local traffic of said Davenport & St. Paul Railroad Company.

30. That said Construction Company, instead of furnishing said equipments as a part of the property of said Davenport & St. Paul Railroad Company—

31. The said Railway Construction Company & said Davenport & St. Paul Railroad Company leased ninety (90) cars of said Western Car Company at a rental of twenty dollars per car per month, & have paid out of the income of said railroad the sum of twenty-four thou-

31 sand dollars; & afterwards, when it was the contract & duty of said Construction Company to furnish said cars & more cars as a part of the equipment of said road—

32. That said Davenport Railway Construction Company, on the day of , A. D. , made a contract with said Davenport & St. Paul Railway Company to construct & build station-houses for said railroad, & they stipulated for an issue of stock, which gave them the control of said railroad comparation.

33. That the same persons own a majority of the stock & control & govern the Davenport & St. Paul Railroad Company.

32 34. The Davenport Railway Construction Company & the Western Car Company knew the Construction Company were bound to furnish said cars; & said contract of lease, instead of purchase, was a fraud on the creditors of the Davenport & St. Paul Railroad Company, & said Construction Company is bound to pay for the cost price of said cars, but to refund & return & *return* to the plaintiff, as trustee, all the money paid for the use thereof; that said Railway Construction Company has for more than two years past, without any contract or bargain, but of their own will & power, taken possession & used & operated the said Davenport & St. Paul Railroad, & has rec*over* the income

33 thereof & appropriated it to its own use.

35. That it has neglected to pay the operatives it employed, & the income for other purposes.

36. That it has totally neglected to apply the surplus income above operating expenses to the payment of the interest on said bonds, in violation of & with a full knowledge of the terms of said mortgage.

37. That the said Construction Company sold the said four hundred & fifty thousand in amount of bonds, & violated the conditions of the said mortgage with a full knowledge thereof.

34 38. That the said suit of Moses Dewitt Loomis in this court is a collusive suit of the said Railway & Construction Company; that it was brought by the members of the Construction Company, or some of them, in the name of Loomis, who is a clerk of Andrew Carmegie, a member of said Construction Company.

39. That Loomis is not the bone fide owner of said $5,000 of bonds, but they belong to Carmegie or some member of the company, who purchased them & delivered them to Loomis to bring this suit.

40. That said Dennison voluntarily appeared to said bill & assented to said French being appointed receiver, who was, at the time of

34½ the said appointment, president of the railroad company & secretary of the construction company, & a stockholder therein; & saught & obtained said appointment as receiver, knowing he was not a proper person to be appointed.

41. That Dennison has been removed as a trustee by said bondholders, as they were authorized to do by said deed of trust, & he has no authority further to act as such.

42. The acts of said Dennison & other things herein specified are contrary to equity and tend to the plaintiff's injury. To the end therefore that *that* the said defendants may, if they can, show cause why

35 your petitioners should not have the relief herein prayed, & may full answer make to all the allegations of this bill, but not under oath, which is waived, your petitioner pray that a writ of subpœna issue from this court directed to said defendants to answer by a day therein named, that an account may be taken of what is doing & owing to the plaintiff as trustee for said bondholders under said deed of trust or mortgage for principal & interest.

That said defendants may be decreed to pay what shall be found due & owing on said account, together with costs of foreclosure, by a short day to be appointed by the court for that purpose, your petitioners being ready & willing & offering at said appointed time to reconvey said mortgaged premises unto said defendants as this court may direct. And in 'fault of such payment that said defendants, & all persons claiming under them, be barred & foreclosed of equity of redemption, & said mortgaged property be sold by a special master to be appointed by this court to satisfy said debt, interest & costs.

That said ninety cars may adjudged to be the property of said Davenport & St. Paul Railroad Company, & sold as a part of the property included in said mortgage.

That said trustees may be decreed to have a prior lien on said roadbed & ties, &c., in Delaware & Fayette Counties, over said Delaware Railway Construction Company, said Sarah E. Burch, administratrix of the H. M. Burch, & Burch & Burch, Lakin & Co., or if they have any lien said construction company may be decreed to pay it.

That said construction company may be decreed to account for the income of said railroad company while in their possession.

That they may be adjudged to pay to the plaintiff the sums paid for rent of said cars & all other income of said railroad misappropriated by them; that they may be decreed to pay the cost of the suit of Loomis up to the time of the appointment of John E. Henry as receiver.

Your petitioner prays for such other & further relief as his case may require.

GRANT & SMITH,
Att'ys for Pl'ff.

JAMES GRANT,
Of Counsel.

(Endorsed:) In cir. ct. of U. S., dist. of Iowa. Moses Dewitt Loomis vs. Davenport & St. Paul Railroad Company & others. Substituted bill filed May 14, 1875. George B. Corkhill, clerk. Grant & Smith, att'ys for pl'ff. J. Grant, of counsel.

UNITED STATES OF AMERICA:

Circuit court of the United States, district of Iowa. In equity.

MOSES DEWITT LOOMIS
vs.
THE DAVENPORT & ST. PAUL RAILROAD Company & The Davenport Railway Construction Company et al.

The separate answer of the Western Car Company to the petition or cross-bill of Lewis H. Meyers, filed in the above-entitled cause:

This respondent, saving and reserving to itself & for answer unto said petition, says that it knows nothing of the making of the trust deed or mortgages in said petition mentioned, nor of the making the supplemental mortgage in said petition mentioned. And respondent denies that any such deeds of trust or mortgages creates any lien of any kind or nature as against the property of this respondent.

Respondent, further answering, says it is not informed whether the Davenport Railway Construction Company agreed to furnish equipments and rolling stock for the traffic and operations of this said Daven-

port & St. Paul Railroad Company, and therefore neither admits or denies the same, but calls for proof, so far as the same might affect in any way the rights of this respondent.

Respondent, further answering, avers and admits that the said Davenport & St. Paul Railroad Company leased of your respondent ninety cars of the property of your respondent, consisting of eighty (80) box cars, numbered from 100t o 200 inclusive, and ten (10) stock cars, Nos.
301 to 310 inclusive. Each and all of said cars, for the purpose of
41 preserving the evidence of the ownership of said cars, were marked
or lettered with the letter W, thus (W), which cars were leased to said railway under a written lease, the original of which will be introduced on the final hearing hereof, and Exhibit G may be a copy thereof, but that a copy of said lease is hereto attached marked Exhibit A.

Respondent, further answering, denies that said Davenport Railway Construction Company leased said above-named cars from your respondent, or ever leased any other cars from it, but avers that said cars were leased from your respondent by said railway company as in said written lease set forth.

And respondent, further answering, avers that said railway company
has not complied with its part of said lease or contract, but has
42 failed so to do, and that said railway company is now indebted
to your respondent for rent due on said cars the sum of $15,000.00 and over, for rent due them prior to the appointment of a receiver for said road, and also in the sum of $12,000.00 for rental due under said lease for the use of cars belonging to your respondent since the appointment of such receiver.

And respondent further avers that the receiver in said cause has not paid to your respondent any part or parcel of the rent due for the use of any cars belonging to your respondent since the appointment of such receiver, nor has any part or parcel of such back rent, or rent accruing prior to the appointment of such receiver, been paid to your respondent, and your resp't now asks that such rental be paid to it, under the order
and direction of the court.

43 Respondent, further answering, avers that it did not know that
said construction company had agreed or pretended to agree to
furnish any rolling-stock or other equipments for or to said railroad company for its local traffic, neither did respondent know that said contract of lease was a fraud on the creditors of said railroad company, and respondent denies that the same was a fraud.

And respondent avers that said railroad company had the right & power to lease said cars of this respondent, and that respondent had a right to furnish the same under said lease, and respondent avers that the same was and is a legal and binding contract between respondent and said railway company, and that no persons have any lien on
said cars, nor did said construction company have anything to do
44 with the renting of said cars either directly or indirectly.

Respondent, further answering, says that all that part of said cross-bill or petition in which it is claimed that the property of this respondent is in any way held by virtue of any mortgage or deed of trust made by said Davenport & St. Paul Railroad Company is wholly untrue, and that said mortgage nor said supplemental mortgage do not in way hold or create any lien upon respondent's said property under any laws of the State of Iowa.

Respondent, further answering as to all and singular the allegations in said cross-bill or petition of said Lewis H. Meyers not herein particularly admitted, answered, traversed, or denied, respondent neither admits or denies the same, but so far as they in any way affect the
45 rights of this respondent, it calls for proof.

And now having fully answered, prays, &c.

SHEEN & BLACK,
Sol's for Respondent.

(Indorsed:) U. S. c't court, dist. of Iowa. Moses D'Witt C. Loomis vs. The Davenport & St. Paul R. R. Co. et al. Separate answer of the Western Car Co. Filed Nov. 10, 1875. George B. Corkhill, clerk.

46 On the 14th day of August, A. D. 1875, the Western Car Company by its solicitors filed in said cause its answer to said bill of complaint, which said answer is in the words and figures following, to wit:

47 *Answer of the Western Car Company to the bill in equity of Lewis H. Meyer filed in said cause*

UNITED STATES OF AMERICA:

In the circuit court, district of Iowa. In equity.

MOSES DE WITT LOOMIS
vs.
THE DAVENPORT & ST. PAUL RAILROAD COMPANY, The Davenport Railway Construction Company, et al.

This respondent saving, reserving, &c., for answer unto the said petition says that it is not advised whether Lewis H. Meyer is a citizen of the State of New York or not, nor whether said Meyer was appointed a trustee of the mortgage as set forth in said bill, nor as to whether there was ever executed and delivered to William Dennison and John
48 Edgar Thompson a certain deed or indenture of mortgage, as set forth in said bill, nor whether the bonds, principal and interest, mentioned in said mortgage were to be paid in gold coin, nor whether said bonds were of the denomination of $1,000 each, payable to John Edgar Thompson or bearer, as in said bill set forth, nor whether by the terms of said mortgage only $20,000 per mile for each mile of main line of said road upon which the work of grading, bridging, and tieing were to have been completed, were to be issued; neither is respondent advised as to the number of miles of the main line of said road that has been graded, bridged, and tied, but avers that the bonds in the hands of Moses De Witt Loomis, the original plaintiff in this suit, are valid.

Respondent, further answering, is not advised as to the provisions of said deed of trust, and neither admits or denies the same, as
49 the same is set out in said bill, but calls for strict proof; nor is respondent advised as to whether said deed of trust was duly recorded, as in said bill set forth, but calls for proof, nor as to whether the Davenport & St. Paul Railway Company executed and delivered any other deed of trust or mortgage, by way of supplement, as in said bill set forth; nor is respondent advised as to the supplemental deed, if any such there be, nor as to whether any second supplemental deed of

trust was made, nor as to whether the provisions of such deed of trust are correctly set out in said bill.

Respondent, answering further, says he is not advised as to the number of bonds that have been issued, nor as to the number of miles of road that may have been built, but calls for proof; neither is respondent advised as to whether interest has been paid upon said bonds,
50 or not, nor as to whether the principal and interest of said bonds are due.

Respondent does not know as to the claims of the other defendants, mentioned by the petitioner in said bill, nor as to any judgments that may have been recovered against the Davenport & St. Paul Railroad Company, & has no interest therein.

Neither is respondent advised as to whether William Dennison was served only by publication in certain suits mentioned in said bill, or whether he is now performing the duties of trustee under the mortgage mentioned, nor whether such judgment creditors claim a right to redeem said mortgaged premises.

Neither is respondent advised as to whether the said railway construction company agreed with the bondholders that the subscriptions along the line of said road would grade, bridge, and tie same ready for
51 iron, and that in case such subscriptions were not sufficient that said construction company would do it, nor is respondent informed whether said construction company agreed to furnish equipments for the traffic of *of* said railroad company.

But respondent admits and charges the fact to be that said Davenport & St. Paul Railroad Company leased ninety cars belonging to this respondent, which said lease was made on the first day of October, A. D. 1873, a copy of which is hereto attached marked Exhibit A, and asked to be taken as a part of this answer. (Exhibit G of Meyer's bill.)

And this respondent denies that said construction company ever leased any cars belonging to this respondent.

This respondent, answering, says that said contract has not been complied with on the part of the Davenport & St. Paul Railroad Com-
52 pany, but that the said railroad company is now largely indebted to this respondent for the rental of said ninety cars.

And further, that the receiver appointed by the court in the suit of Moses De Witt Loomis against the Davenport & St. Paul Railroad Company and the Davenport Railway Construction Company et al. has now the possession of cars belonging to this respondent, for which not one cent of rent has been paid since the appointment of the said receiver, or since the appointment of George H. French as receiver in said suit; but that the said receiver has used the same without any payment therefor whatever, and that he has now in his possession cars, and that the said Davenport & St. Paul Railroad Company is now justly indebted to the Western Car Company in the sum of dollars, which amount ought, by the said receiver, to be paid.

And this respondent asks that this court will order a payment
53 of the same, together with a return of all the cars that said receiver has now in his possession belonging to this respondent.

This respondent, further answering, says that the Western Car Company did not know that the Construction Company were bound to buy said cars or that they had no right to lease said cars. Neither did respondent know that said contract of lease was a fraud on the creditors of the said railroad company; and denies that the same was a fraud, and avers that said railroad company had the right and power to lease said cars of this respondent, and that this respondent had a right to

furnish said cars upon the said rental, and had the right to make the said lease bearing date October 1, 1873.

This respondent, further answering, says that he is not advised, and neither admits nor denies, whether the railway construction com-
54 pany took possession of the Davenport & St. Paul Railroad Company and has received the income thereof and appropriated it to its own use. Neither does it admit that it has neglected to pay the operatives it employed and use the income for other purposes. But this respondent does admit that it has not been paid the rent due for the use of its said cars. Nor is respondent advised as to whether the said railroad company has neglected to pay the interest on the said bonds mentioned in said bill, nor whether the said construction company violated the conditions of the said mortgage.

Respondent denies that the suit of Moses De Witt Loomis in this court is a collusive suit, so far as this respondent is concerned; but admits that said Loomis does not claim that the cars of this respond-
55 ent belong to said railroad company. Neither does Moses De Witt Loomis claim that he has any lien upon the property of this respondent by virtue of the bonds secured by a mortgage upon the property of said railroad company.

Respondent is not advised as to whether said Loomis is a bona fide owner of said bonds or not, and neither admits nor denies the same; nor whether said Dennison voluntarily appeared to said bill and assented to the appointment of George H. French, the receiver; but admits that at the time George H. French was appointed receiver he was president of the Davenport & St. Paul Railroad Company; but deny that he sought and obtained said appointment knowing he was not a proper person; but on the contrary this respondent avers that he was a proper person to act as said receiver. Nor is respondent advised as to whether
56 said Dennison has been removed as a trustee by the bondholders, and neither admits or denies the same.

Respondent further says that all that part of said bill in which it is claimed that the property of this respondent is in any way held by virtue of any mortgage or deed of trust made by said Davenport & St. Paul Railroad Company is wholly untrue, and that the said mortgage and the said supplemental mortgages do not in any way hold or effect the property of this respondent.

And now, having fully answered, prays, &c.

THE WESTERN CAR COMPANY,
By SHEEN & BLACK,
Its Solicitors, Peoria, Ill.

(Endorsed:) U. S. circuit court, district of Iowa. Moses De Witt Loomis vs. Davenport & St. Paul Railroad Company et als. Answer of the Western Car Company.

Presented to be filed Aug. 14, 1875.

GEORGE B. CORKHILL, *Clerk.*

SHEEN & BLACK,
Sol's, Peoria, Ill.

57 On the 14th day of November said complainants, by their solicitors, filed in said clerk's office an amendment to their bill of complaint, which said amendment is in the words and figures following, to wit:

58 U. S. circuit court, district of Iowa.

MOSES DE WITT LOOMIS, LEWIS H. MEYER, & Wm. Dennison,
vs.
THE DAVENPORT & ST. PAUL RAILROAD COMpany & others.

Now comes the plaintiffs and amend their bill against the Western Car Company and add thereto in the charging part of the same the following allegations:

The plaintiffs aver that the said Western Car Company made a contract with the Davenport & St. Paul Railway Construction Company, dated, as already stated, on the 21st day of October, 1873, whereby a prior sale of 80 box cars, Nos. 121 to 200 inclusive, all marked W, was converted into a lease already set out in said bill.

59 That said lease recites that said 90 cars having been the property of the Western Car Company and by them delivered to the Davenport & St. Paul Railroad Company at dates previous to 1st Feb., 1873, as per receipts of the railway company, and the ownership of said cars having been afterwards transferred to said Western Car Company, it was understood and agreed by said contract to have said cars as heretofore recited in the bill.

Now the plaintiff avers that said 90 cars had before the 1st October, 1873, been delivered to said railway company on a contract of sale, and had been in the possession and use of said railway company at & prior to the 1st of Feb., 1873, under said contract of sale of said kind & by said contract of 1st October.

60 It was recited that ownership of said cars had been, after said delivery to the Railway Company, transferred to the Western Car Company, and by that instrument sold with a condition to the Railway Company.

The plaintiffs allege that there was no change of possession by said contract of 1 October, 1873, & the said cars had always after the delivery referred to in said recital been in the possession and use of the Railway Company.

That said cars on delivery became the property of the said Railway Company as part of the equipment referred to in said mortgage, which covered all future acquisitions of cars by the company. That said mortgage became defaulted for non-payment of interest, and the property included in it was taken possession of by the receiver of this court.

61 That said contract of 1 October, 1873, was never recorded as required by the laws of this State, & the title under the same is not as to the plaintiffs' creditors of said Railway Company.

JAMES GRANT,
For Pl'ffs.

(Endorsed:) 552. Eq. In cir. c't U. S., dist. of Ia. Moses Dewitt Loomis, Lewis H. Meyer, & William Dennison vs. D. & St. Paul R. R. Co. & others. Amendment to bill as to West. Car Co. Filed Nov. 13, 1875. George B. Corkhill, clerk. Jas. Grant, for pl'ffs.

62 On the 6th day of December, A. D. 1875, said Western Car Company, by its said solicitor, filed in said clerk's office its answer to said amendment, which said answer is in the words and figures following, to wit:

63 *Answer of the Western Car Company to the amended bill.*

UNITED STATES OF AMERICA:

In the circuit court, district of Iowa.

MOSES DEWITT LOOMIS, LEWIS H. MEYER, and WILLIAM DENNISON *vs.* THE DAVENPORT AND ST. PAUL RAILROAD Company et al. } In equity.

And now comes the Western Car Company and for answer unto the amended bill of said complainants as against this respondent, says that this respondent did not make any contract with the Davenport and St. Paul Railway Construction Company, as in said amended bill alleged.

Respondent, further answering, says that it did not with said Railway Construction Company, on the 21st day of October, 1873,
64 make a contract whereby a sale of 80 box-cars, numbered from 121 to 200, inclusive, all marked with a circle, "W," was converted into a lease of such cars; but avers the facts to be that it never had any dealings of any kind or nature with said Railway Construction Company in regard to said cars. And avers that said cars are not and never were the property of said Railway Construction Company, nor the property of the Davenport and St. Paul Railway Company, but that they were always and are now the cars of this respondent, and that they were never in the possession of said Railway Construction Company, but only in the possession of said Davenport and St. Paul Railway Company, under the lease referred to as an exhibit in the bill of said Meyer, heretofore in this cause filed.

Respondent, further answering, avers that the said cars had been delivered to said Davenport and St. Paul Railroad Company by the Western Car Company Association, a corporation by that name then existing.

And further, that this respondent is the successor of said Western
65 Car Company Association, and that as such successor became the owner of each and all of said cars in the name of the Western Car Company.

And respondent answering, further says that said lease was made with this respondent by said Davenport and St. Paul Railroad Company, in which it was declared according to the facts as they then existed and yet exist, that the ownership of said cars had been transferred to this respondent, not by the Davenport and St. Paul Railway Construction Company nor the Davenport and St. Paul Railroad Company, but by said Western Car Company Association.

Respondent, further answering, denies that said 90 cars had, before the first day of October, 1873, been delivered to said Railway Company on a contract of and had been in the possession and use of said Railway Company at and prior to the first day of February, 1873, under any contract of sale of any kind or nature whatever.

But respondent avers that the recital in said lease of October 1st, 1873, that the ownership of said cars had been transferred to this
66 respondent had reference only to the fact that the said cars had been transferred by the said Western Car Company Association to this respondent in the name of the Western Car Company, and that such reference did not relate to any ownership of said cars having been

transferred from said Railroad Company or said Construction Company. But respondent avers that the possession of said cars was delivered to this respondent at the time of the transfer of such ownership, and avers further that said cars never were in the possession of said Railway Company under any contract of sale, but only under a lease similar to the one referred to as an exhibit in said bill.

Respondent, further answering, denies that said cars ever became the property of said Railway Company as a part of its equipment as referred to and alleged in said amended bill, and denies that the mortgage referred to in said amended bill in any way covered or was a lien upon said 90 cars.

67 And respondent further says that it knows nothing of said mortgage having become defaulted by the non-payment of interest, and therefore neither admits or denies the same. Nor does respondent know anything about the property having been taken possession of by the receiver, which was included in said mortgage, but avers that the receiver or no one else had any right to take possession of said 90 cars as the property of said Railroad Company, as being covered by said mortgage.

And respondent avers that said mortgage was in no way a lien upon said cars, nor had the receiver or any person else any right to take possession thereof as being covered by such mortgage.

Respondent, further answering, denies that the laws of Iowa require any such contract as the lease from respondent to said Railway Company to be recorded, and avers that the failing to record such lease in no way affects the title of this respondent to said cars, under the laws of the State of Iowa or of any other State as to the creditors of said Railroad Company or anybody else.

68 And the respondent avers that the title to said cars under the laws of said State of Iowa, and under the laws of the land, is and always has been good in this respondent.

Respondent, further answering, denies each and every allegation in said amendment to said bill.

And now having, &c.

WESTERN CAR COMPANY,
By SHEEN & BLACK,
Its Sol's.

(Endorsed;) 552. Moses Dewitt Loomis vs. D. & St. P. Ry. Co. et al. Answer of Western Car Com. Filed Dec. 6, '75. George B. Corkhill, clerk. Sheer & Black, for Western Car Co.

69 On the 18th day of March, 1876, the said Western Car Company, by its solicitors, filed an amendment to its answer in said cause, in words and figures following, to wit:

70 In the United States circuit court, district of Iowa.

MOSES DEWITT LOOMIS,
vs.
THE DAVENPORT & ST. PAUL RAILROAD COMpany et al.

The answer of the Western Car Company to the amended bill of complainant herein having reference to this respondent.

This respondent hereby refers to its answer heretofore filed in this

cause, and hereby makes the same a part of this answer, and prays that the same may be taken as a part of this answer.

Respondent, further answering, denies that it made a contract with the Davenport & St. Paul Railway Construction Company, dated the 21st day of October, 1873, whereby a prior sale of 80 box cars, Nos. 121 to 200, inclusive, an' marked W, was converted into a lease, and respondent avers that it never sold or leased any cars to said company.

71 Respondent, further answering, denies that said lease recites that said 90 cars, having been the property of Western Car Company, and by it delivered to the Davenport & St. Paul Railway Company at dates previous to February 1st, 1873, as prior receipts of the Railway Company, the ownership of said cars having been transferred to said Western Car Company; an' respondent avers that prior to said lease said cars were owned by a corporation known by a name other and different from the name by which this respondent is now know'; and it further avers that the recital in said lease which refers to the ownership of said cars having been transferred to this respondent has reference only to the transfer of the ownership of said cars by such other car company to this respondent; and respondent avers that with such transfer neither the said Railway Company or Construction Company had anything to do therewith is interest therein. Respond-

72 ent further denies that said 90 cars were ever delivered to said railway on a contract of sale, and it further denies that said cars were ever in the possession or use of said Railway Company under any contract of sale.

Respondent further denies that said cars, by any instrument whatever, were sold with a condition to said Railway Company, but it avers that it became the owner of said cars as recited in said lease, whereupon it leased the same to said Railway Company, as appears by said ease, reference thereto being hereby made.

Respondent avers that upon its becoming the owner of said cars it became possessed of the same, and delivered the same to said Railway Company upon entering into said lease.

Respondent denies that said cars, or their delivery under said lease to said Railway Company, became the property of said Railway Company as a part of the equipments referred to in said mortgage,

73 which covered all future acquisitions of cars by said Railway Company, and respondent avers that said 90 cars were only leased and never sold to said Railway Company, and that said mortgage in no way covered the same, nor was the right or title of respondent in and to said cars in any way affected by said mortgage.

Respondent, further answering, avers that the receiver in said cause never had of but 34 or 36 of said 90 cars, and that the remainder of said 90 cars said receiver never had possession of, directly or indirectly.

Respondent admits said lease was never recorded, but avers that the recording thereof was not and is not required under the laws of the State of Iowa; and it further that neither said railway company nor said receiver nor any of the creditors of said railway company have any lien, title, or claim in or to any of said cars.

74 And now having fully answered, respondent prays, &c.

THE WESTERN CAR COMPANY.
By SHEEN & BLACK, *Solicitors.*

(Endorsed:) M. D. W. Loomis vs. D. & St. Paul R. R. Co. et al. Answer of W. Car Co. Filed Mar. 18, 1876. E. R. Mason, clerk.

75 On the 20th day of March, 1876, the complainants, by their said solicitor, filed in said clerk's office their replication in said cause in words and figures as follows, to wit:

76 *General replication.*

In the circuit court of U. S., district of Iowa.

MOSES DEWITT LOOMIS & LEWIS H. MEYER & Wm. Dennison & Trustees et al.
vs.
THE DAVENPORT & ST. PAUL RAILWAY COMPANY et al.

Replication of Moses Dewitt Loomis & trustees to answer of Western Car Company.

To the honorable judge of the circuit court of the United States, district of Iowa:

These repliants, saving and reserving to themselves all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said Western Car Company, for replication say they do and will aver, maintain, and prove their said amended bill to be true (as well as said original bill), certain and sufficient in law to be answered unto by the
77 said car company; and that the said Western Car Company is very uncertain, evasive, and insufficient in law to be replied unto by this repliant; and these plaintiffs humbly pray as in their said amended bill they have already prayed.

GRANT & SMITH,
For Loomis & Trustees et al.

(Indorsed:) In the circuit court of the United States for the district of Iowa. Moses Dewitt Loomis & others vs. The Davenport & St. Paul Railroad Co. et al. General replication to answer of Western Car Co.'s. Filed Mar. 20, 1876. E. R. Mason, clerk. Grant & Smith, for trustees.

78 On the 18th day of March, 1876, there were filed in said clerk's office in said cause the following notices, to wit:

79 In the United States circuit court, district of Iowa. Chancery.

MOSES DEWITT LOOMIS
vs.
THE DAVENPORT AND ST. PAUL RAILROAD Company et al.

To Grant and Smith:

You are hereby notified as attorneys of record in the above cause, that on the 18th day of February, A. D. 1876, the Hon. J. M. Love, judge of said court, ordered that a notice be served upon you as attorneys of record in said above-entitled cause, to show cause at 2 o'clock p. m., on the 14th day of March, A. D. 1876, before him at chambers, in Iowa City, in the State of Iowa, against the application of the Western Car Company for leave to file its petition or cross-bill in said cause, and also to

file its answer to amended bill in said cause heretofore filed so far
80 as the same refers to said Western Car Company.

SHEER & BLACK,
Sol's for W. C. Co.

(Endorsed:)
Messrs. Grant & Smith:
Please sign & return to T. J. Black, Peoria, Illinois.
No. 552. Moses Dewitt Loomis vs. Davenport & St. Paul R'y Comp'y. Notice to Grant & Smith. Filed March 18, 1876. E. R. Mason, clerk.

Received copy of within this 2nd day of March, 1876.

GRANT & SMITH.

81 [James Grant, S. F. Smith; Grant & Smith, attorneys at law, Davenport, Iowa.]

DAVENPORT, *March* 4, 1876.

T. J. BLACK,
Peoria, Ill.:

DEAR SIR: We have yours of 3d & note contents, with copy of proposed petition or cross-bill. If you had applied to us we would have interposed no objection to your filing it.

We don't remember to have seen the answer. Send copy of it and we will allow you to file them, & we will answer & reply as soon as we get time.

Yours truly,

GRANT & SMITH.

82 In the United States circuit court, district of Iowa. Chancery.

MOSES DEWITT LOOMIS
vs.
THE DAVENPORT AND ST. PAUL RAILROAD Company et al.

To Ingersoll and Puterbaugh:

You are hereby notified as attorneys of record in the above cause, that on the 18th day of February, A. D. 1876, the Hon. J. M. Love, judge of said court, ordered that a notice be served upon you as attorneys of record in the said above entitled cause, to show cause at 2 o'clock p. m., on the 14th day of March, A. D. 1876, before him at chambers, in Iowa City, in the State of Iowa, against the application of the Western Car Company for leave to file its petition or cross-bill in said cause, and also to file its answer to amended bill in said cause heretofore filed,
83 so far as the same refers to said Western Car Company.

SHEEN & BLACK,
Sol's for W. Car Co.

(Endorsed:) No. 552. Equity. Moses Dewitt Loomis vs. Davenport and St. Paul Railway Company. Notice to Ingersoll & Puterbaugh of application of Western Car Company. Filed May 18, 1876. E. R. Mason, clerk.

Received a copy of the within this first day of March, 1876.

INGERSOLL & PUTERBAUGH.

84 In the United States circuit court, district of Iowa. Chancery.

MOSES DEWITT LOOMIS
vs.
THE DAVENPORT AND ST. PAUL RAILROAD Company et al.

To S. E. Brown, J. D. Campbell, and Brown, Campbell and Gould:

You are hereby notified as attorneys of record in the above cause that on the 18th day of February, A. D. 1876, the Hon. J. M. Love, judge of said court, ordered that a notice be served upon you as attorneys of record in said above entitled cause, to show cause, at 2 o'clock p. m., on the 14th day of March, A. D. 1876, before him at chambers, in Iowa City, in the State of Iowa, against the application of the Western Car Company for leave to file its petition on cross-bill in said cause, and also to file its answer to the amended bill in said cause
85 heretofore filed, so far as the same refers to said Western Car Company.

SHEER & BLACK,
Sol's for Western Car Co.

(Endorsed:)

Messrs. Brown, Campbell & Gould:

Please sign below & return to Thos. J. Black, Peoria, Ills.

Filed Mar. 18, 1876. E. R. Mason, clerk.

Received a copy of the within this 2d day of March, 1876.
S. E. BROWN.
J. D. CAMPBELL.
BROWN, CAMPBELL & GOULD.

86 On the 18 day of March, 1876, the Western Car Company, by its solicitors, filed in said clerk's office its petition against the Davenport Railroad Company et al., which said petition is in the words and figures following, to wit:

87 *Bill in equity.*

UNITED STATES OF AMERICA:

In the circuit court, district of Iowa.

MOSES DE WITT LOOMIS
vs.
THE DAVENPORT & ST. PAUL RAILROAD Company, the Davenport Railway Construction Company, et al.

To the judges of the circuit court of the United States for the district of Iowa:

The Western Car Company, a corporation created by and existing under the laws of the State of , brings this bill against the Davenport & St. Paul Railroad Company, the Davenport Railway Construction Company, the Delaware Construction Company, citizens of the State of Iowa, Lewis H. Meyer, of the State of New York,

88 William Dennison, a citizen of the State of Ohio, Ambrose Bibby, Andrew Munday, Benjamin Burch, surviving partner of B. & H. M. Burch, John L. Davies & Son, Beiderbeck & Miller, W. C. Wadsworth & Co., Francis W. French, R. Krause, Childs & Co., L. Lowenstein & Co., Lowell Corbet & Co., M. Foley, Benjamin Burch, J. H. Lakin, Wm. Burch, composing the firm of Burch, Lakin & Co., Robert Vantyne, and Jason L. Payne, Sarah E. Burch, administratrix of the estate of H. M. Burch, deceased, Charles M. Lockwood, Richard Moore, H. S. Babcock, and Geo. H. French, his assignee, M. L. Rogers, First National Bank of Davenport, Hiram Price, Daniel Stevens, Richard Ellwood, John Hornby, Lewis Bell, C. S. Peet, Lucius Howard, Brown & Martin, the Delaware Railway Construction Company, Leroy Jackson, S. Denton & Co., Westfall & Heines, Elizar Davis, J. H. Leach, E. Hoag,
89 L. S. Davies, surviving partner of John L. Davies & Son, all being citizens of the State of Iowa.

First. The Western Car Company avers that it was incorporated for the purpose of building and leasing railway cars to railway companies; and that on or about the 1st day of October, 1873, it was the owner of 90 cars, 80 of said cars being box cars, and numbered from 121–200 inclusive, and the remaining 10 being stock cars, and numbered from 301–310 inclusive; that about that time the Davenport & St. Paul Railroad Company applied to said Western Car Company to lease said cars, and that said car company did on the 1st day of October, 1873, lease to said Davenport & St. Paul Railroad Company the said 90 cars above described, as will more fully appear by a copy of the lease at that time duly executed by and between the Western Car Company
90 and the Davenport & St. Paul Railroad Company, a copy of which lease is set out in the bill filed in this cause by Lewis H. Meyer and marked Exhibit G, and prayed to be taken as a part of this bill.

Second. That said Davenport & St. Paul Railroad Company took possession of the said cars under and by virtue of the said lease, and used the same in the business of said road until the appointment of Geo. H. French as receiver in this cause; that afterwards, to wit, on or about the 10th day of March, 1874, said Western Car Company took possession of 56 of the said cars, leaving in the possession of said receiver 34 cars, the property of said car company, and that at the time last mentioned there was then due as rental to said Western Car Company for the use of said cars the sum of about $15,000.

91 Third. And that from that time until the present the receiver of said Davenport & St. Paul Railroad Company has had the possession and use of said 34 cars, to wit:

That no rental has been paid to said Western Car Company for the use of said cars, and that there is now due said Western Car Company for the rental of said 34 cars up to the 1st day of November, 1875, the sum of $12,000, which added to the rental due up to and including the 17 day of December, 1874, in the aggregate the sum of $ about 27,000.

Fourth. The Western Car Company claims that the amount due for the rental of said cars should be considered as a part of the current operating expenses of said road, and should be paid before any other claims or liens in favor of any of the said defendants herein mentioned.

92 Fifth. The Western Car Company prays that the said receiver be ordered to pay to said car company, the said sum of $27,000 so due for the rental of said cars up to the said 1st day of November, 1875, and at the same rate per car so long as the said receiver under

the orders of this court shall retain the possession and use of said cars. And further, that said receiver deliver over to said Western Car Company the said 34 cars now in his possession.

And your complainant will ever pray, &c.

THE WESTERN CAR COMPANY,
By SHEEN & BLACK, *Solicitors.*

DIST. OF IOWA:

Upon consideration of the foregoing petition, it is ordered that a notice be served on the counsel of complainants and the other attorneys of record in the above named cause to show cause before the un-
93 dersigned, at chambers at Iowa City, Iowa, on the 14th day of March, 1876, at two o'clock p. m., against the application of the petitioner herein for leave to file this petition or cross-bill, and also answer to amended bill.

Iowa City, Iowa, Feb'y 18th, 1876.

(S'g'd) J. M. LOVE, *Judge.*

(Endorsed:) Loomis vs. Davenport & St. Paul et al. Petition of Western Car Co. Filed Mar. 18, 1876. E. R. Mason, clerk.

94 On the 14th day of March, 1876, the same being at chambers, the court made the following order in said cause, which appears of record as follows, to wit:

95 In circuit court U. S. for the dist. of Iowa.

MOSES DEWITT LOOMIS
vs.
THE DAVENPORT AND ST. RAILROAD COMPANY et al. } Bill in equity.

AT CHAMBERS,
Iowa City, March 14th, 1876.

Upon consideration of the petition of the Western Car Company, a corporation created by and existing under the laws of , it is ordered that said party have leave to file its answer & cross bill in said case, subject to the decision of said circuit court in term.

J. M. LOVE, *Judge.*

(Endorsed:) No. 552. Moses Dewitt Loomis vs. Davenport & St. Paul R'y Co. Order giving leave to file petition & ans. Western Car Com. Filed March 18, 1876. E. R. Mason, clerk.

96 On the 25th day of May, 1877, the said complainants answered said citation, which said answer is in the words and figures following, to wit:

97 *Answer to the petition of the Western Car Company.*

In the United States circuit court for the district of Iowa.

MOSES DEWITT LOOMIS ET AL.
vs.
THE DAVENPORT AND ST. PAUL RAILROAD Company et al.

Lewis H. Meyer, trustee for the bondholders under the mortgage

named in the bill filed in this cause, for answer to the petition of the Western Car Company, says:

1st. The Western Car Company may be a corporation, but the defendant does not know and cannot answer.

2nd. The defendant denies that on October 1st, 1873, the said Western Car Company was the owner of 90 cars marked as alleged,
98 and alleges that said cars were then owned and in the possession of the Davenport and St. Paul Railroad Company, delivered to it under a contract of lease and conditional sale, between July 15, 1872, and made prior to the one set forth in plaintiffs' petition, and February 15, 1873, which contract was never recorded, and said cars were used by said railroad company, and rent paid therefor to the Western Car Company Association to a large amount, but by said delivery and possession became the property of said railroad company and subject to the plaintiffs' mortgage by operation of the laws of Iowa.

That it is true that on October 1st, 1873, the said Western Car Company and said railroad a company made the contract of lease and conditional sale referred to in the petition.

3rd. It is not true that said railroad company took possession under said lease or by virtue thereof. It is true that it had possession thereof previous to said contract, and agreed to pay rent therefor to said Western Car Company. It is true that it used them in its business
99 up to the time of the receiver's appointment.

It is not true that on March 10, 1874, the said car company took possession of 56 of said cars, leaving in the possession of the receiver 34 of said cars.

Denies that anything was due for rent.

And these defendants further answer:

4th. That, in December, 1874, George H. French, the receiver of said railroad company, and a member and stockholder of said Western Car Company, and a director in the Davenport Railway Construction Company, was in the bill of Loomis appointed a receiver of said railroad and property, and claimed said cars as subject to said mortgage, and when other creditors garnished the Chicago & Northwestern Railroad Company in relation thereto, said French obtained an attachment order from this court in this case against said Chicago & Northwestern Railroad Company to compel the delivery of said cars to him as such
100 receiver; and, at the same time, said car company applied to this court for the payment of rent therefor, and when it was refused, said car company, on March 10th, 1875, not 1874, obtained a writ of replevin against said Chicago and Northwestern Railroad Company, which suit is now pending in Chicago, Illinois, and took 58 of said cars from its possession while they were in transit, to be returned to said receiver, having been sent by him with freight to Chicago, and they have never taken or had any other possession thereof, and that was in contempt of this court, to which they had applied for rent, and thereby admitted the possession of the receiver.

This defendant admits that no rent has been paid by the receiver, and alleges that none is due, and never was, and he denies that petitioners have any right to it out of the earnings of the road.

5th. This defendant says that the contract of October 1st, 1873, is fraudulent & void in law; that, when it was executed, B. E. Smith was president of said car company, secretary of said con-
101 struction company, and director in said railroad company; that George H. French was president of said railroad company, di

rector or secretary in said construction company, and stockholder in said Western Car Company.

Having answered, this defendant prays that said petition may be dismissed and the petitioners ordered to return the said 58 cars, which they replevined in contempt of the authority of this court.

(Signed) JAMES GRANT,
Sol'r for L. H. Meyer, Trustee.

(Endorsed:) 552. Eq. Moses Dewitt Loomis vs. Davenport & St. Paul R'y Co. et al. Ans. to intervening petition Western Car Co. J. Grant, for Meyer.

102 On the same day there was filed in said clerk's office an agreed statement of facts in said cause, in words and figures following, to wit:

103 U. S. C. C., dist. of Iowa.

LOOMIS AND MEYER ET AL.
v.
DAVENPORT AND ST. PAUL R. R., WESTERN Car Company, & others.

It is agreed that the case of the Western Car Company, wherein the trustees claim 90 cars under their mortgage, and the car company claims the same, under a contract of 1st October, 1873, may be tried on the following facts, taken into consideration with the evidence on record:

The cars were delivered to the Davenport and St. Paul R. R. Co., under a conditional contract or lease with an association called the Western Car Company Association, between the 8 Feb., 1872, and 15 Feb., 1873, & 22,179.02 was paid for the rental thereof prior to 1 Oct., 1873, under a similar lease or contract to them of Oct. 1, 1873.

2. At or prior to October 1, 1873, the Western Car Company
104 Corporation was formed, and the contract of 1 Oct., 1873, was executed between it and the railroad company, of which a copy is annexed to Connor's deposition, and the words "having been the property of the Western Car Company Association, and by them delivered" to the said railroad company, mentioned in the contract of 1st , 1873, refer to the delivery above named, and the Western Car Company claim title to & rental for the cars under the contract of 1st Oct., 1873.

2. The trustees of the bondholders claim title under the mortgage dated 12 May, 1871, and amendments thereto, which are duly recorded, as set out in the bill of Meyer & others.

3. The contract of 1st October, 1873, under which the Western Car Company claim title and right to possession and rent, was never recorded. The receiver has paid no rent for the cars.

The cars in controversy were marked W, as stated in the contract of 1st Oct., 1873.

105 4. The said cars were all in use in the business of the railroad for their delivery, and were constantly passing in & for the road to Chicago & back, on the Northwestern rail, & in carrying & earning freight for the Davenport and St. Paul road up to the time of the receiver's appointment. Some parties garnished the cars against the N. W. road, & upon application to this court an order was made on the Northwestern Railroad to deliver the cars to the receiver. Before this order was executed, the Western Car Company applied to this court to order a payment of rent to them by the receiver, and when that order

was refused, the car company, through the same attorneys who applied to this court for rent, replevined 58 of the cars from the Northwestern R. R. by writ of replevin from the U. S. circuit court at Chicago.

5. It is admitted that when the contract of the 1st October, 1873, was executed, B. E. Smith was president of the Western Car Co., director and president of the Davenport Railway Construction Company,
106 and stockholder in the Davenport & St. Paul R. R. Co.; that at the same time George H. French was president of the Davenport & St. Paul R. R. Co., secretary of the Construction Company.

6. If the court decides that the Western Car Company is entitled to the cars, the amount of rental is to be fixed by a reference to such competent person as the court may select.

GRANT, *Sol. for Trustees.*
SHEEN & BLACK,
R. G. INGERSOLL,
NATH'L FRENCH,
Per NATH'L FRENCH,
Solicitors for Western Car Co.

(Endorsed:) Filed May 25, 1877. E. R. Mason, C. Loomis v. D. & St. Paul R. R. Co. Western Car Co.'s case. Agreed facts.

107 On the trial of said cause, the complainants, to sustain the issues on their part, introduced and read in evidence certain depositions, in words and figures following, to wit:

108 U. S. c. c't, district of Iowa.

MOSES DE WITT LOOMIS, LEWIS H. MEYER, & others,
vs.
THE DAVENPORT & ST. PAUL RAILROAD Company & others.

W. M. Kaeiser, a notary public in and for Scott County, Iowa, is hereby appointed commissioner to take the deposition of J. Smith Connor, to be read in the above-entitled cause, under the rules in equity.
JOHN F. DILLON, *Judge.*

Commissioner's fee, $5.25; p'd by plaintiffs' att'ys.

109 (Endorsed:) M. Dewitt Loomis, Lewis H. Meyer, et als., vs. The Davenport & St. Paul R'y Co., et als. Order appointing commissioner to take deposition.

110 *Notice to take deposition.*

U. S. c. c't, district of Iowa.

LEWIS H. MEYER AND OTHERS
vs.
THE DAVENPORT AND ST. PAUL RAILWAY Company & others.

To the Western Car Company & Davenport Railway Construction Company:

Please take notice that on the 7th day of January, 1876, at Davenport, Iowa, before a commissioner or examiner to be named by one of the judges of the above-named court, we shall take the deposition of J

Smith Connor, a witness living at Davenport, Iowa, and more than one hundred miles from Des Moines, to be read in evidence on the trial of the above cause, in matters where you are defendants.

111 We give you notice that we desire the evidence to be taken orally.

GRANT & SMITH,
For Pl'ff's.

We hereby accept service of this notice to take deposition & acknowledge receipt of copy for the Western Car Company & the Davenport Railway Construction Company, this 31st of Dec., 1875.

SHEEN & BLACK.

STATE OF IOWA,
Scott County:

By virtue of the foregoing commission, I do appoint the 7th day of January, 1876, for taking the deposition of said J. Smith Connor, and the plaintiffs are required to give the defendants 7 days' notice thereof.

112 This 31st day of December, A. D. 1875.

[SEAL.] W. M. KAEISER,
Commissioner & Notary Public.

Be it remembered that on this 7th day of January, A. D. 1876, the plaintiff in this cause appeared by Grant & Smith their att'ys & the defendants by W. S. Bush their att'y, and the witness being absent the plaintiffs' att'ys moved the adjournment of the taking of said deposition to nine o'clock on Saturday, the 8th day of January, A. D. 1876, which was accordingly done.

The said W. S. Bush, esq., att'y for defendants, objected to said adjournment.

Witness my hand & seal this 7th day of January, 1876.

[SEAL.] W. M. KAEISER,
Commissioner & Notary Public, Scott Co., Iowa.

113 In U. S. c. ct., dist. of Iowa.

M. DE WITT LOOMIS & LEWIS H. MEYER ET ALS.
vs.
THE DAVENPORT & ST. PAUL RAILROAD CO. ET AL.

It appearing by the acceptance of service of notice hereto attached that due notice was given the defendants, as required, for the taking the deposition of J. Smith Connor, on this 8th day of January, A. D. 1876, at nine o'clock, pursuant to adjournment, we proceed to take the said deposition, James Grant, of the firm of Grant & Smith, appearing for the plaintiffs, & J. D. Campbell, esq., appearing for the Southwestern Car Company. The said witness, J. Smith Connor, being produced,

114 sworn, and examined before me, a notary public in and for Scott County in the State of Iowa, by virtue of the annexed commission, and upon the interrogatories as propounded by counsel, to be read as evidence in *in* the above entitled cause now pending in said court on behalf of the plaintiff.

Deposition of J. Smith Connor.

The said J. SMITH CONNOR, being first duly sworn, doth depose and say, in answer to the several interrogatories, as follows:

Direct examination by JAMES GRANT:

Int. 1. What is your name, age & place of residence?

Ans. J. S. Connor; age, 56; reside in Davenport.

Int. 2. Do you know the parties, plaintiffs and defendants, to this suit?

Ans. I do.

115 Int. 3. Do you know anything about the 90 cars that are in controversy between the plaintiff & the Western Car Company?

Ans. I do.

Int. 4. Please state when these cars first came into possession of the Davenport & St. Paul Company, how long they remained in their possession, & how much rental was paid on the same prior to the execution of the contract for the lease & conditional sale thereof? State when that contract or lease was made? State if you are an officer of the company. If you have the possession of that contract produce the same & furnish a copy to the master and state how much rental was paid after the execution of said contract.

116 Ans. Ten Box cars on February 8, 1872, Nos. 121 to 130 inclusive; four box cars, February 15th, 1872, No. 131, 136, 139, 140; six box cars, Feb'r 17, 1872, 132, 133, 134, 135, 137, 138; ten box cars, Feb'r 20, 1872, Nos. 141 to 150, inclusive; ten (10) stock cars, March 22d, 1872, Nos. 301 to 310, inclusive; twenty-five box cars, December 10, '72; one car June 10, 1873, No. 172; one car, June 20, 1873, No. 175; twenty-five cars, Feb'r 15, 1873. I think the two last named are included in this number.

I now give the numbers of these cars from the agreement: 80 box cars, Nos. 121 to 200, inclusive; ten stock cars, Nos. 301 to 310, inclusive. They remained in the possession of the R. R. Co. until some time in December, 1874, when about fifty-seven were garnished in the hands of the Chicago & Northwestern Rwy. Co. Prior to the execution of

117 the contract twenty-two thousand one hundred & seventy-nine & $\frac{02}{100}$ (22,179.02) dollars. The contract was dated first (1st) day of October, 1873.

I am secretary of the company & have the original of said contract in my possession. I now produce original & furnish copy, which is marked Exhibit A. After the date of said contract there was paid twenty-one thousand ($21,000) dollars.

Int. 5. State whether or not said contract of lease or conditional sale was ever recorded?

Ans. It was not.

Int. 6. State whether or not you have a contract of Davenport Railway Construction Company with the Davenport & St. Paul Railroad Company to furnish cars to the railroad company; and, if so, please produce the same & attach a copy to your deposition.

118 Ans. I have in my possession the original agreement between said parties to furnish necessary rolling-stock for local traffic, & present a copy, marked Exhibit B.

Int. 7. State whether or not these ninety cars were necessary for the local traffic of the road?

Ans. I cannot say.

Int. 8. Were they used for that purpose?

Ans. That is outside of my department & I cannot say.

Int. 9. Do you know when the Davenport Railway Construction Company took possession of the Davenport & St. Paul Railroad, and how long they remained in possession? If so, please state.

Ans. The Davenport Railway Construction Company took possession of the branch from Davenport to Maquoketa on January 1st,
119 1872. The main line from Eldridge, north, was operated by the construction company as they built it, & was never in possession of the Davenport & St. Paul Railroad Company nor operated by it.

Int. 10. Who operated & received the income of the Davenport & St. Paul R. R. from the first day of January, 1872, up to the time of the appointment of the receiver?

Ans. It was operated by the Davenport Railway Construction Co., under the general management of C. W. Smith, who had the entire control of the receipts & disbursements.

Int. 11. What office did said Smith hold in the railroad and construction company, & what office did you hold?

Ans. Mr. Smith was general manager of the operating department of the Davenport Railway Construction Company, but had no
120 position in the Davenport & St. Paul Railroad Company. I was auditor & cashier of the operating department of said construction co., & secretary & treasurer of said railroad company from June, 1872.

Int. 12. How much were the net earnings of the said railroad for the 1872, 1873, 1874, up to the time of the appointment of the receiver? Please give the same, including rental of these 90 cars & excluding them.

Ans. I submit the same, copied from the books, marked Exhibit C.

Int. 13. Who received the entire income, both net & gross, from the first of January, 1872, up to the time of appointment of the receiver?

Ans. From January 1st, 1872, till June of that year the receipts were paid over to W. H. Price, cashier of the operating department
121 of the Davenport R'y Construction Company. Subsequent to that time the receipts were paid to me as cashier of said construction company.

Int. 14. Do you know of any contract between the railroad co. & the construction co., for the operating of this road?

Ans. I do not.

Int. 15. Who owned a majority of the stock of the railroad co.?

Ans. The Davenport Railroad Construction Company.

Int. 16. Who was president of the car company & who was president of the construction company when that car contract was signed?

Ans. B. E. Smith.

Int. 17. How much of the main line of the railroad was graded, bridged, & tied, with iron upon it, or ready for the iron, & how much of the branch, when the receiver took possession?

Ans. From North Davenport to Fayette, about 125 miles, & from Eldridge to Maquoketa, about 32 miles.

122 Int. 18. How far from the town of Davenport to the place where the track is laid down & the road operated?

Ans. About one mile from the corporate limits, & about two miles from the business part of the city.

Int. 19. Please furnish to the master the entire amount of bonds issued under mortgage, as appears from the books in your office.

Ans. I do, & mark it Exhibit D.

123 Int. 20. State what was due for the opperating expenses, including the laborers & supplies.

Ans. I attach statement, marked Exhibit E.

At the foregoing examination of Mr. J. S. Connor there was present J. D. Campbell, esq., of counsel for the Southwestern Car Company, who have filed a petition in this cause, claiming the ownership & possession of five of the cars spoken of by the witness, and asked leave to examine the witness, as follows:

By Mr. CAMPBELL:

Int. 1. You have stated in your examination that the ninety cars leased of the Western Car Co. came on to the Davenport & St.
124 Paul Railroad after Jan. 1, 1872, and that from the first of Jan., 1872, up to the time of the appointment of the receiver, the Davenport Railway Construction Co. was continually in possession of the railroad & operated it during the whole of that time. I now ask you who had the possession, use, and occupancy of the said cars from the time they came on the road down to the time of the appointment of the receiver?

Ans. The operating department of the Davenport Railway Construction Company.

Int. 2. What do you know of the manufacture of five cars, four box cars & one stock car, for the said Construction Company by the Southwestern Car Company, of Jeffersonville, Indiana, & of a certain lease or conditional sale made between said companies in respect to the same?

125 Ans. These five cars were purchased by C. W. Smith, general manager, to replace five cars destroyed by the fall of a part of Monticello bridge, on the Dubuque Southwestern Line. Of the lease or contract I know nothing.

Int. 3. Is it not true as a fact that those cars, after the delivery by the Southwestern Car Company, remained in the hands & possession of the Davenport Railway Construction Company, & were used by it in the operation of the St. Paul Railroad up to the time of the appointment of the receiver, and were they at any time in possession of the Davenport & St. Paul Railroad Company?

Ans. To the first part of the interrogatory I answer, Yes; & to the last I answer, No.

126 Int. 4. Do you know of the execution & delivery of certain acceptances by the Construction Company to the Southwestern Car Company on account of these cars; if so, what were they & how many & which of them remain unpaid?

Ans. I think there were eight acceptances. I know the amount was twenty-four hundred & ninety-five & $\frac{88}{100}$ ($24,095.88) dollars, & I don't know of any of this amount having been paid.

Int. 5. Were not those acceptances signed by you as cashier of the Construction Company?

Ans. They were, as cashier of the operating department of that company.

Re-examination by Mr. GRANT:

Int. 1. Was there ever any lease, contract, or agreement of any description between the Davenport Railroad Construction Co. & the Davenport & St. Paul Railroad Co., by which the railroad co. was
127 dispossessed of any of it sproperty, real or personal?

Ans. Not that I know of.

Int. 2. Were these five cars placed on the railroad in place of those destroyed?

Ans. They were, as already explained by me.

Re-examination by Mr. CAMPBELL:

Int. 1. What do you know as to the knowledge of the Southwestern Car Co. or notice to them of the purposes & intentions of the Construction Company in procuring the five cars, or of the use to which they were put?

Ans. Nothing whatever.

J. S. CONNER.

Commissioner's fees, $5.25, p'd by plaintiffs' att'ys.

STATE OF IOWA,
County of Scott:

I, W. M. Kaeiser, a notary public in & for said county & State, hereby certify that, under and by virtue of the commission hereto at-
128 tached, the foregoing deposition of J. Smith Connor was taken before me, & after the same had been reduced to writing by me, and read over by the said witness, were subscribed and sworn to by the deponent therein, at Davenport, in the county of Scott, on the 8th day of January, A. D. 1876.

Witness my hand & seal the date last above written.

[SEAL.] W. M. KAEISER,
Notary Public, Scott Co., Iowa.

129 EXHIBIT A.

Articles of agreement concluded this first day of October, A. D. 1873, by and between the Western Car Company, party of the first part, and the Davenport and St. Paul Railroad Company, party of the second part, witnesseth:

That for and in consideration of the promises and agreements of the said second party hereinafter mentioned, the said first party hereby hires to said second party ninety (90) railroad cars, as follows, viz: Eighty (80) box cars, Nos. 121 to 200 (inclusive), and ten (10) stock cars, Nos. 301 to 310 (inclusive), said ninety (90) cars having been the property of the Western Car Company Association, and by them delivered to the party of the second part, at dates previous to February 15th, 1873, as per receipts of said second party, and the ownership of said cars
130 having afterward been transferred to the party of the first part, all of said cars being marked W.

It is understood and agreed by the parties hereto that the said ninety (90) cars are to be used by said second party in its regular business of transportation over its own and other railroads for the term of five years from the date of the contract, which shall be renewed on the expiration of said five years on like agreements and conditions as those of this contract upon the request of either of the parties hereto, a written notice of such request to be given by the party making it on the other party not less than one year previous to the expiration of said five years.

In consideration whereof the said second party hereby promises and agrees—

131 First. To pay the said first party as rental for the use of each of said cars twenty dollars for each and every month during the existence of the contract and its renewal, if renewed, said payments to be made to such person on behalf of said first party as it shall designate in writing from time to time, and until otherwise so designated to the secretary of said first party; and the receipts of such payments of said person so designated or said secretary of said first party, as the case may be, shall be the only evidence of such payments said first party shall require of said second party therefor.

Second. In case any of the said cars shall be destroyed or so disabled by accident or otherwise as to be unfit for safe and proper use at
131½ any time during the existence of this contract, or the renewed contract, if renewed, the said second party shall, at its own expense, immediately replace such destroyed or disabled cars with an equal number of like cars of equally good material, construction, and value in all respects as were those so destroyed or disabled before the destruction or disabling of the same, and shall have said replacing cars numbered, lettered and marked as were the said destroyed or disabled cars; each and all of said replacing cars shall become and be the property of said party of the first part, the same as were the destroyed or disabled cars they shall have replaced.

Third. The said second party shall, at its own expense, maintain and keep each and all of said ninety (90) cars during the existence
132 of this contract and its renewal, if renewed, in good repair and in safe and proper running order, and at its own expense furnish all the material for and make all renewals of said cars from time to time as they shall be needed to put and keep them in proper condition for regular use, said material to be in every respect equal in quality to the material for like purposes originally used in the construction of said cars, and at the termination of this contract, or the renewed contract, if renewed, return said cars to the party of the first part in proper condition and repair for the immediate and active use thereof, it being understood and agreed between the parties to this contract that said second party may, and hereby reserves the privilege of purchas-
133 ing said cars at any time during the existence of this contract or the renewal thereof, if renewed, by paying or securing to be paid to said first party to its satisfaction the original cost thereof.

It is understood and agreed between the parties hereto that to preserve the evidence of the ownership of said cars in the said first party, they shall be severally marked or lettered as follows, viz, W, which shall be in addition to any marking or lettering of said cars said second party may make for its convenience.

In case the said second party shall fail at any time during the existence of this contract or the renewed contract, if renewed, to promptly pay the interest on the principal of any of its bonds or other liabilities when the same shall have respectively become due, the said first
134 party may, if it so elect, terminate this contract immediately after such default, by written notice of the president of said first party to the president or secretary of said second party, personally served on said president or secretary, or sent to either of them by the United States mail; and the said second party agrees, on the service of said written notice as aforesaid, to deliver forthwith to said first party the actual possession as the owner thereof of each and all of said (90) cars, and those with which said second party shall have replaced the same, each and all of which cars shall, on such delivery, be in proper condition and repair for the immediate and active use thereof.

[SEAL.] THE WESTERN CAR COMPANY,
By B. E. SMITH, *President.*

Attest:
E. C. SMITH, *Secretary.*

[SEAL.] THE DAVENPORT & ST. PAUL R. R. CO.,
By GEO. H. FRENCH, *President.*

Attest:
J. S. CONNOR, *Secretary.*

135 EXHIBIT B.

Memorandum of an agreement made this twenty-ninth day of February, eighteen hundred & seventy-two, between the Davenport & St. Paul Railroad Company of the first part, and the Davenport Railway Construction Company of the second part; witnesseth:

Whereas the contract between the parties hereto made May twelfth, 1871 (eighteen hundred & seventy-one), does not provide for the party of the second part furnishing any rolling stock for the use of said road. The said party of the second part agrees to furnish such rolling stock as shall be necessary for local traffic. The same to be subject to the 1st mortgage bonds & to hold the cost and interest on same as a
136 claim against the Davenport & St. Paul Railroad Company for future payment.

This agreement is supplementary to said contract of May twelfth (12), eighteen hundred & seventy-one (1871).

(Signed) DAVENPORT & ST. PAUL R. R. Co.,
By GEO. H. FRENCH, *Pres.*

Witness:
A. CARUEGIE.
M. DONAHUE.

DAVENPORT RAILWAY CONSTRUCTION COMPANY,
By B. E. SMITH, *Pres.*

137 EXHIBIT C.

Net earnings of the Davenport & St. Paul Railroad during the years 1872, 1873, *and till Dec'r* 19*th*, 1874.

1872.

Earnings from all sources	$121,468 62
Operating expenses and taxes	128,237 72
Deficit	$6,769 10
By deductions from expenses amount paid Western Car Company	8,509 02
Would leave a surplus of	$1,739 92

1873.

Earnings from all sources	$189,369 21
Operating expenses and taxes	205,368 41
Deficit	$15,999 20
Deduct from expenses am't paid Western Car Co	20,870 00
Would leave a surplus of	$4,870 80

1874 (till Dec'r 19th).

Earnings from all sources	$182,039 15
Operating expenses and taxes	166,307 20
Surplus	$15,731 95
Deduct from expenses amount paid Western Car Co	13,800 00
Would leave a surplus of	$29,531 95

138 EXHIBIT D.

Amount of first-mortgage bonds issued by the Davenport & St. Paul Railroad Company.

1871.			
October 16.	1,000 7% gold bonds of $1,000 each, Nos. 1 to 1000 inclusive, with coupons dated July 1, 1871, at 40 years; interest payable semi-annually on January 1 and July 1. Sent by express to B. E. Smith, pres't, Columbus, Ohio, to be disposed of according to contract		1,000,000 00
1872.			
January 9.	1,000 7% gold bonds of $1000 each, Nos. 1001 to 2000 inclusive, with coupons as above, and sent by express as above		1,000,000 00
" 30.	1,000 7% gold bonds of $1,000 each, Nos. 2001 to 3000 inclusive, with coupons as above, delivered in New York to B. E. Smith, pres. Davenport Railway Construction Co		1,000,000 00
October 19.	3,000 7% gold bonds of $1,000 each, Nos. 3001 to 6000 inclusive, with coupons as above		3,000,000 00
			6,000,000 00

EXHIBIT E.

Amount due by the operating department of the Davenport Railway Construction Co. December 19, 1874.

Due employees in Oct., Nov., and till Dec'r 19, 74	21,106 91
" for supply bills and track rent (not including Western Car Co	10,282 52
	31,389 43

139 (Endorsed:) In U. S. c. c't, dist. of Iowa. M. De Witt Loomis, L. H. Meyer, et als., vs. The Davenport & St. Paul R'y Co. et al. Deposition of J. S. Connor. Filed May 13, 1876. E. R. Mason, clerk. As to claim of Western Car Co.

140 And the defendant, to sustain the issues on its part, introduced and read in evidence certain documents and depositions, true copies of which are as follows, to wit:

141 Western Car Company's intervening petition in the suits of Loomis vs. D. & St. P. R. R. Co. et al., Meyer vs. D. & St. P. R. R. Co. et al., in the U. S. circuit court for Iowa.

[Charles Nettleton, notary and commissioner for all the States and Territories, No. 117 Broadway.]

CHARLES NETTLETON,
Attorney at Law.

NEW YORK, *April 6th*, 1877.

GENTLEMEN: You will please take notice that on the 20th day of

April, A. D. 1877, at eleven o'clock a. m. of that day, at my office at No. 117 Broadway in the city, county, and State of New York, I will proceed to take the depositions de ben esse of Benjamin E. Smith and F. Lovejoy upon interrogatories propounded by R. G. Ingersoll, solicitor for Western Car Company, at which time and place you are hereby notified to be present.

Yours, &c.,

CHARLES NETTLETON.
Notary Public for N. Y. County, in N. Y.

142 To Mess. GRANT & SMITH,
Counsellors at law, Davenport, Iowa.

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

Chas. E. Mills, of lawful age, being by me first duly sworn, on his oath doth depose and say:

That on the 6th day of April, A. D. 1877, at New York City, he enclosed in an envelope addressed to Mess. Grant & Smith, counsellors at law, Davenport, Iowa, a duplicate of the within notice for taking testimony de bene esse of Benjamin E. Smith and F. Lovejoy, and duly deposited said envelope, with enclosure so addressed, in the U. S. post-office at New York City on said 6th day of April, 1877, having first duly prepaid the postage thereon.

CHAS. E. MILLS.

Sworn and subscribed before me this 24th day of April, 1877.
[SEAL.] CHARLES NETTLETON,
Notary Public for New York County, in N. Y.

143 EXHIBIT B.—C. N., not. pub., N. Y. City, N. Y., April 20, '77.

Articles of agreement concluded this first day of October, A. D. 1873, by and between the Western Car Company, party of the first part, and the Davenport and St. Paul Railroad Company, party of the second part, witnesseth:

That for and in consideration of the promisses and agreements of the said second party hereinatter mentioned, the said first party hereby hires to said second party 90 (ninety) railroad cars, as follows, viz: 80 (eighty) box cars, Nos. 121 to 200 (inclusive), and ten (10) stock cars, Nos. 301 to 310 (inclusive); said ninety (90) cars having been the property of the Western Car Company Association, and by them delivered to the party of the second part at dates previous to February 15th, 1873, as per receipts of said second party, and the ownership of said cars having afterward been transferred to the party of the first part, all of said cars being marked

It is understood and agreed by the parties hereto that the said 90 (ninety) cars are to be used by said second party in its regular
144 business of transportation over its own and other railroads for the term of five years from the date of this contract, which shall be renewed on the expiration of said five years on like agreements and conditions as those of this contract upon the request of either of the parties hereto, a written notice of such request to be given by the party making it on the other party not less than one year previous to the expiration of said five years. In consideration whereof the said second party hereby promises and agrees—

First. To pay the said first party as rental for the use of each of said cars twenty dollars for each and every month during the existence of this contract and its renewal, if renewed; said payments to be made to such person on behalf of said first party as it shall designate in writing from time to time, and until otherwise so designated to the secretary of said first party; and the receipts of such payments of said person
145 so designated or said secretary of said first party, as the case may be, shall be the only evidence of such payments said first party shall require of said second party therefor.

Second. In case any of said cars shall be destroyed, or so disabled by accident or otherwise as to be unfit for safe and proper use, at any time during the existence of this contract, or the renewed contract, if renewed, the said second party shall, at its *one* expense, immediately replace such destroyed or disabled cars with an equal number of like cars of equally good material, construction, and value, in all respects as were those so destroyed or disabled before the destruction or disabling of the same, and shall have said replacing cars numbered, lettered, & marked as were the said destroyed or disabled cars. Each and all of said replacing cars shall become and be the property of said party of the first part, the same as were the destroyed or disabled cars they shall have replaced.

145 Third. The said second party shall, at its own expense, maintain and keep each and all of said 90 cars during the existence of this contract and its renewal, if renewed, in good repair & in safe and proper running order, and at its own expense furnish all the material for and make all renewals of said cars from time to time, as they shall be needed, to put and keep them in proper condition for regular use, said material to be in every respect equal in quality to the material for like purposes originally used in the construction of said cars, and at the termination of this contract or the renewed contract, if renewed, return said cars to the party of the first part in proper condition and repair for the immediate and active use thereof.

It being understood and agreed between the parties to this contract that said second party may and hereby reserves the privilege of purchasing said cars at any time during the existence of this contract, or the renewal thereof, if renewed, by paying, or securing to be
147 paid to said first party, to its satisfaction the original cost thereof.

It is understood and agreed between the parties hereto that to preserve the evidence of the ownership of said cars in the said first party they shall be severally marked or lettered as follows, viz,

(W) which shall be in addition to any marking or lettering of said cars said second party may make for its convenience. In case the said second party shall fail at any time during the existence of this contract, or the renewed contract, if renewed, to promptly pay the interest or the principal of any of its bonds or other liabilities when the same shall have respectively become due, the said first party may, if it so elect, terminate this contract immediately after such default, by written notice of the president of said first party to the president or secretary of said second party, personally served on said president or secretary, or sent to either of them by the United States mail, and the said second party agrees on the service of said written notice as aforesaid
148 to deliver forthwith to said first party the actual possession as the owner thereof of each and all of said 90 (ninety) cars, and those with which said second party shall have replaced the same, each

& all of which cars shall, on such delivery, be in proper condition and repair for the immediate and active use thereof.

THE WESTERN CAR COMPANY,
By B. E. SMITH, *Pres't.*

Attest:
E. C. SMITH, *Sec'y.*

THE DAVENPORT & ST. PAUL R. R. CO.,
B. GEO. H. FRENCH, *Pres't.*

Attest:
J. S. CONNER, *Sec'y.*

(Endorsed:) Agreement between The Western Car Company and D. & St. P. R. R. Co. October 1st, 1873. 80 box-cars; 10 stock-cars. True copy.

149 EXHIBIT A.—C. N., Not. Pub., N. Y. City, N. Y., April 20, '77.

Articles of agreement concluded this first day of October, A. D. 1873, by and between the Western Car Company, party of the first part, and the Davenport and St. Paul Railroad Company, party of the second part, witnesseth:

That for and in consideration of the promisis and agreements of the said second part hereinafter mentioned, the said first party hereby hires to said second party 90 (ninety) railroad cars, as follows, viz, 80 (eighty) box-cars, Nos. 121 to 200 (inclusive), and ten (10) stock cars, Nos. 301 to 310 (inclusive), said ninety cars having been the property of the Western Car Company Association, and by them delivered to the party of the second part at dates previous to February 15th, 1873, as per receipts of said second party, and the ownership of said cars having afterward been transferred to the party of the first part, all of said cars being marked (X/W)

It is understood and agreed by the parties hereto that the said 90 (ninety) cars are to be used by said second party in its
150 regular business of transportation over its own and other railroads for the term of five years from the date of this contract, which shall be renewed on the expiration of the said five years on like agreements and conditions as those of this contract upon the request of either of the parties hereto, a written notice of such request to be given by the party making it on the other party not less than one year previous to the expiration of said five years.

In consideration whereof the said second party hereby promises and agrees—

First. To pay the said first party as rental for the use of each of said cars twenty dollars for each and every month during the existence of this contract and its renewal, if renewed, said payment to be made to such person on behalf of said first party as it shall designate in writing from time to time, and until otherwise so designated to the secretary of said first party, and the receipts of such payments of said per-
151 son so designated or said secretary of said first party, as the case may be, shall be the only evidence of such said first party shall require of said second party therefor.

Second. In case any of the said cars shall be distroyed or so disabled by accident or otherwise as to be unfit for safe and proper use, at any time during the existence of this contract or the renewed contract, if renewed, the said second party shall at its own expense immediately

replace such destroyed or disabled cars of equally good material, construction, and value in all respects as were those so destroyed or disabled before the destruction or disabling of the same, and shall have said replacing cars numbered, lettered, and marked as were the said destroyed or disabled cars; each and all of said replacing cars shall become and be the property of said party of the first part the same as were the destroyed or disabled cars they shall have replaced.

152 Third. The said second party shall at its own expense maintain and keep each and all of said 90 cars during the existence of this contract and its renewal, if renewed, in good repair and in safe and in proper running order, and at its own expense furnish all the material for and make all renewals of said cars from time to time as they shall be needed, to put and keep them in proper condition for regular use; said material to be in every respect equal in quality to the material for like purposes originally used in the construction of said cars, and at the termination of this contract or the renewed contract, if renewed, return said cars to the party of the first part in proper condition and repair for the immediate and active use thereof.

It being understood and agreed between the parties to this contract that said second party may and hereby reserves the privilege of purchasing said cars at any time during the existence of this contract

153 or the renewal thereof, if renewed, by paying or securing to be paid to said first party to its satisfaction the original cost thereof.

It is understood and agreed between the parties hereto that to preserve the evidence of the ownership of said cars in the said first party they shall be severally marked or lettered as follows, viz, (W) which shall be in addition to any marking or lettering of said cars said second party may make for its convenience.

In case the said second party shall fail at any time during the existence of this contract or the renewed contract, if renewed, to promptly pay the interest on the principal of any of its bonds or other liabilities when the same shall respectively have become due, the said first party may, if it so elect, terminate this contract immediately after such default, by written notice of the president of said first party to the president or secretary of said second party, personally served on said president or secretary or sent to either of them by the United States mail, and the said second party agrees, on the service of the said

154 written notice as aforesaid, to deliver forthwith to said first party the actual possession as the owner thereof of each and all of said 90 (ninety) cars and those with which said second party shall have replaced the same, each and all of which cars shall on such delivery be in proper condition and repair for the immediate and active use thereof.

THE WESTERN CAR COMPANY,
By B. E. SMITH, *Pres't.*

Attest.
E. C. SMITH, *Sec'y.*

THE DAVENPORT AN' ST. PAUL R. R. CO.,
By GEO. W. FRENCH, *Pres't.*

Attest.
J. S. CONNER, *Sec'y.*

(Endorsed:) Copy of contract between the D. & St. P. R. R. Co. and the W. Car Co.

155 In the circuit court of the United States for the district of Iowa.
May term, 1877.

LOOMIS
vs.
DAVENPORT & ST. PAUL RAILWAY COMPANY et al. } In equity.

MEYER
vs.
DAVENPORT & ST. PAUL RAILWAY COMPANY et al. } In equity.

Western Car Company intervening petitioner in each case.

Deposition of Frederick Lovejoy, on behalf of the Western Car Company, intervening petitioner.

STATE OF NEW YORK,
City & County of New York, ss:

I hereby certify that on Friday, the 20th day of April, A. D. 1877, before me, Charles Nettleton, a notary public of the State of New
156 York, duly appointed, commissioned, and sworn, and residing in said city of New York, at my office, at No. 117 Broadway in the said city of New York, between the hours of 11 o'clock a. m. and 5 o'clock p. m. of that day, was produced to and personally came before me Frederick Lovejoy, the witness named in the notice hereto annexed, to depose in two civil causes depending in the circuit court of the United States for the district of Iowa, wherein Loomis is plaintiff in one case and the Davenport & St. Paul Railway Company is defendant, and in the other cause where Meyer is plaintiff and the Davenport & St. Paul Railway Company is defendant, and the Western Car Company is an intervening petitioner in both cases; that I was then and there attended by Samuel M. Harrington, esq., of counsel for the said Western Car Company, and by no other counsel or person on behalf of any other of the parties to said causes or either of them.

The said FREDERICK LOVEJOY, being of lawful age and sound mind, and being by me first duly examined, cautioned, and sworn to tell
157 the truth, the whole truth, and nothing but the truth touching his knowledge of the matter and things in said civil causes, deposed and said as follows in answer to the following interrogatories propounded to him on behalf of said Western Car Company:

1st interrogatory. What is your name, residence, and occupation, and connection with the Western Car Company?

Ans. My name is Frederick Lovejoy; I reside in Philadelphia, Pennsylvania, and I am president of the Western Car Company, the intervenining petitioner in the foregoing entitled suits.

2nd interrogatory. Weere any of the cars of the Western Car Company leased to the Davenport & St. Paul Railway Company; if so, when, how many, and by virtue of what contract?

Ans. Eighty box cars and ten stock cars belonging to the West-
158 ern Car Company were leased to the Davenport & St. Paul Railway Company. These were leased to said railway company prior to and up to May, 1873, by an association known as and called the Western Car Company. On or about the 6th of May, 1873, the intervening petitioner was organized as a corporation under the name of Western

Car Company, by virtue of a charter granted by the State of Delaware.

Under the authority of a resolution adopted May 14th, 1873, the association assigned and transferred its title to said cause and interest in the renting of the same to the intervening petitioner as a corporation.

The said railway continued to use these cars under the arrangement then existing, for a rental of twenty dollars per car per month, until October 1st, 1873, when a new contract was entered into between the intervening petitioner and the said railway company, a true copy of which contract, marked Exhibit A, is hereto annexed.

159 3rd. interrogatory. What is the meaning of the words in that contract which read "and the ownership of said cars having afterward been transferred to the party of the first part"?

Ans. Those words mean that at the time these cars were first let to the said railway company they were the property of the Western Car Company then in existence as an association, only that afterwards when the intervening petitioner was organized as a corporation under a charter granted by the State of Delaware, which was on or about the 6th of May, 1873, then the said ninety cars were transferred to the intervening petitioner as a corporation and became then and have ever since remained its property.

4th interrogatory. Did the Davenport & St. Paul Railway Company or the Davenport Railway Construction Company ever own the cars embraced in the said contract of lease?

160 Ans. Neither of the said companies ever owned those cars or any of them.

5th interrogatory. Were you or any other officer of the Western Car Company authorized to make a secret arrangement by which the said cars should become subject to the claims of the creditors of the Davenport & St. Paul Railway Company or the Davenport Railway Construction Company?

Ans. Neither I nor any other officer of the Western Car Company was ever authorized to make any such arrangement.

6th interrogatory. Do you know of any statements made or thing done to make third parties think the said cars belonged to any other person or corporation than the Western Car Company, and do you know of anything being done or any money being paid in consequence of such a representation?

161 Ans. I do not.

7th interrogatory. Do you know of any fraud or misrepresentation on the part of the Western Car Company or its officers in relation to these cars?

Ans. I do not.

8th interrogatory. Was there any secret or open arrangement by which payments of the rental of said cars should be applied upon the purchase money?

Ans. There was not.

9th interrogatory. Has any money ever been paid towards the purchase of the said cars?

Ans. None whatever.

161½ 10th interrogatory. Did the Western Car Company after the failure of the Davenport & St. Paul Railway Company to pay the interest upon its bonds make demand upon the said railway company or the receiver for the possession of these cars, and did it receive the same?

Ans. Soon after the appointment of the receiver I made demand upon him either for the payment of the rentals or for the cars, and *and* re-

ceived the reply that no doubt the rentals would be paid and that the court would so order. The Western Car Company did not receive the cars; the receiver requested that our company should not resort to any extreme measures, like taking possession of the cars, as he would have the rentals paid so soon as possible, and as he desired to continue to rent the cars for the railway company. This was in the early part of February, 1875.

162 11th interrogatory. How many cars are still retained by the persons in possession of the said railroad?

Ans. Of the ninety cars originally leased to the Davenport & St. Paul Railway Company, fifty-six were replevied by the Western Car Company from the Chicago & Northwestern Railway Company, in whose hands they had been attached, and were delivered to said Western Car Company in said replevin. The remaining thirty-four of said cars are still retained by the persons in possession of the said Davenport & St. Paul Railway Company.

12th Interrogatory. When the receiver was appointed was any rental owing by the Davenport & St. Paul Railway Company to the intervening petitioner for any of said ninety cars; and, if so, how much, and is it yet paid?

Ans. There was due the Western Car Company on the 1st of
163 February, 1875, at which time I understand the receiver was appointed, six thousand four hundred & fifty dollars for the rental of said ninety cars, no part of which has been paid.

13th interrogatory. Has any money been paid to the Western Car Company for the detention of the cars after the receiver was appointed or after possession was demanded?

Ans. Nothing whatever has been paid.

14th interrogatory. Have you anything further to say that will be of benefit to the intervening petitioner in this case?

Ans. Nothing occurs to me at this time.

(S'g'd) FREDERICK LOVEJOY.

I further certify that the foregoing deposition of Frederick Lovejoy was then and there reduced to writing by me in the presence of
164 the deponent, and to him was by me carefully read over, and was by him subscribed in my presence, after having been so reduced to writing, and the reason for taking the said deposition was and is that the deponent, the witness, Frederick Lovejoy, resides at the city of Philadelphia, in the State of Pennsylvania, more than one hundred miles from the city of Des Moines, in the State of Iowa, where the said civil causes are appointed to be tried.

I further certify that I am not of counsel or attorney to either of the parties to these suits, or to the said intervening petitioner, nor in any way interested in the event of either of said causes; and that it being impracticable for me to deliver said deposition with my own hand into the court for which it is taken, I have retained the same, unaltered, in my own hands, for the purpose of being sealed up by me, and then speedily and safely transmitted by mail to the said court for
165 which it is taken, there to remain under my seal entire until opened by proper authority. That the fee of $\$10\frac{25}{100}$ has been paid to me by the Western Car Company for my services in taking said deposition, and that said sum is just and reasonable for that service.

Given under my hand and notarial seal, at the city of New York, N. Y., on the 20th day of April, A. D. 1877.

[SEAL.] CHARLES NETTLETON,
Notary Public for N. Y. County, N. Y.

166 In the circuit court of the United States for the district of Iowa, May term, 1877.

LOOMIS
vs.
DAVENPORT & ST. PAUL RAILWAY COMPANY et al. } In equity.

MEYER
vs.
DAVENPORT & ST. PAUL RAILWAY COMPANY et al. } In equity.

Western Car Company, intervening petitioner in each cause.

Deposition of Benjamin E. Smith on behalf of the Western Car Company, intervening petitioner.

STATE OF NEW YORK,
City and County of New York, ss:

I hereby certify that on Friday, the 20th day of April, A. D. 1877, before me, Charles Nettleton, a notary public of the State of New York, duly appointed, commissioned, and sworn, and residing in said
167 city of New York, at my office at No. 117 Broadway, in the said city of New York, between the hours of 11 o'clock a. m. and 5 o'clock p. m. of that day, was produced to and personally came before me Benjamin E. Smith, the witness named in the notice hereto annexed, to depose in two civil causes depending in the circuit court of the United States for the district of Iowa, wherein in one case Loomis is plaintiff and the Davenport & St. Paul Railway Company is defendant, and in the other cause Meyer is plaintiff and the Davenport & St. Paul Railway Company is defend*end*, and the Western Car Company is an intervening petitioner in both cases; that I was then and there attended by Samuel M. Harrington, esq., of counsel for the said Western Car Company, and by no other counsel or person on behalf of any other of the parties to said causes, or either of them.

The said Benjamin E. Smith, being of lawful age and sound mind, and being by me first duly examined, cautioned, and sworn to tell the

168 as on exhibit?

Ans. I did as the president of the Western Car Company, on the 1st day of October, 1873, sign a contract leasing certain cars to that railway company. The paper I now produce and annex to this my deposition, marked Exhibit B, is a true copy of that contract.

3rd interrogatory. What do the following words in the said contract mean? "And the ownership of said cars having afterward been transferred to the party of the first part."

Ans. Those would mean that the cars mentioned were originally owned by an association composed of forty or fifty different parties, which was afterwards put into a corporation and thereupon the property of the association was transferred to the Western Car Company. The cars leased to the Davenport & St. Paul Railway Company were a part
169 of the property so transferred to the intervening petitioner, the Western Car Company corporation, by the association known as

and called the Western Car Company, whereby all the title to the said cars became, about May, 1873, vested in the intervening petitioner as a corporation.

4th interrogatory. Did the Davenport & St. Paul Railway Company or the Davenport Railway Construction Company ever own the cars embraced in the said contract?

Ans. Never in any way or shape, directly or indirectly. The companies were entirely seperate and distinct, and had no connection whatever with each other.

5th interrogatory. Was the said contract made in good faith, or was there a secret arrangement by which the cars were to be used by the Davenport & St. Paul Railway Company to obtain money or
170 sell bonds?

Ans. The contract was made in good faith. It had no connection, directly or indirectly, with the sale of bonds, and the cars were never used for that purpose in any way or shape, and there was no arrangement, either secret or open, or ever thought of, to that effect by the members or between the managers of any of the said corporations.

6th interrogatory. Was there any statement or representation made by you which would or was intended to induce anybody to buy bonds on the supposition that the said cars were the property of the Davenport & St. Paul Railway Company or the Davenport Railway Construction Company?

Ans. Never in any way or shape. I sold all the bonds myself through Drexel, Morgan & Co., and know that no such statement or
171 representation was ever made.

7th interrogatory. Do you know of any statements made by any one that would induce any one to buy bonds of the said railway thinking the said cars were subject to the said bonds?

Ans. I do not, and do not believe that any such statement was made by any one, as the negotiation of the bonds was in my hands.

8th interrogatory. Did you, as an officer of the Western Car Company, have any authority to make representations that the cars would be subject to the claims of creditors of the Davenport & St. Paul Railway Company or of the Davenport Railway Construction Company? Did any one else have such authority?

Ans. I did not have any such authority. I never made any
172 such representations. No party had any such authority, nor have I ever heard that any such representations were ever made by any one.

9th interrogatory. Do you know of any fraud, misrepresentation, or concealment, on the part of the Western Car Company or its officers, as regards these cars or the transactions in any way connected with them?

Ans. I do not. The contracts were made the same as with any other railroad company that we were leasing cars to, open and aboveboard and in good faith, known by parties and stockholders of both companies.

10th interrogatory. Have you anything else to say for or against the claim of the Western Car Company for possession of these cars, &c.?

Ans. The cars leased under the contracts to the Davenport & St.
173 Paul Railway Company belonging to the Western Car Company were paid for by the last-named company from monies received by the treasurer, from the stockholders of the Western Car Company, paid in by stockholders of that company, and the Davenport & St. Paul

Railway Company has no ownership, lien, or claim in any way or shape, except for the use of said cars, under the said contract for rental.

(S'g'd) B. E. SMITH.

I further certify that the foregoing deposition of Benjamin E. Smith was then and there reduced to writing by me in the presence of the deponent, and to him was by me carefully read over, and was by him subscribed in my presence, after having been so reduced to writing and read over to him, and the reason for taking the said deposition was and is that the deponent, the witness, Benjamin E. Smith, resides at the
174 city of Columbus, in the State Ohio, and more than one hundred miles from the city of Des Moines, in the State of Iowa, where the said civil causes are appointed to be tried.

I further certify that I am not of counsel or attorney to either of these parties to these suits, or to the intervening petitioner, nor in any way interested in the event thereof; and that it being impracticable for me to deliver said deposition with my own hand into the court for which it is taken, I have retained the same, unaltered, in my own hands, for the purpose of being sealed up by me, and then speedily and safely transmitted by mail to the said court for which it is taken, there to remain under my seal until opened by proper authority; that the fee of $10.25 has been paid to me by the Western Car Company for my services in taking said deposition, and that same is just and reasonable for that service.

175 Given under my hand and notarial seal, at the city of New York, N. Y., on this 20th day of April, A. D. 1877.

[SEAL.] CHARLES NETTLETON,
Notary Public for New York County, N. Y.

(Endorsed:) No. 552. Moses De Witt Loomis vs. Dav. & St. Paul R. R. Co. Depo. on part of Western Car Co. Opened by consent and filed May 15, 1877. E. R. Mason, clerk.

176 On the 26 day of May, the same being of the May term of said court, there appears in the records of the proceedings thereof in said cause the following entry, to wit:

177 *Decree in Western Car Company.—Answer, &c.*

United States circuit court, district of Iowa, May term, A. D. 1877.
Saturday, May 26th, 1877.

MOSES DE WITT LOOMIS ET AL.
vs.
DAVENPORT AND ST. PAUL RAILRAOD COMpany et al. } No. 552. Eq.

And now, May 26th, 1877, being at the May term of the said court, this cause came on for hearing on the bills, amendments, answers, replications, and cross-bill, answer, and replication, agreed state of facts, depositions, and records in the cause, so far as the same relates to the cars claimed by the Western Car Company.

And the said complainants in said amended and substituted bill appearing by James Grant, their solicitor, and the defendant, the Western Car Company, appearing by R. G. Ingersoll and J. D. Campbell, its solicitors, and the court having heard the allegations, stipulations,

and proofs of the said parties, and being now fully advised
178 in the premises, it is found by the said court, and ordered, adjudged, and decreed, that the allegations contained in the said answer of the said The Western Car Company are true and sufficient; that the said ninety (90) cars mentioned and described in the said complainants' amended and substituted bill, and leased by the said The Davenport and St. Paul Railroad Company from the said The Western Car Company, at all times were and now are the property of the said Western Car Company, and that the said Western Car Company is entitled to the immediate possession thereof.

And it is thereupon further ordered, adjudged, and decreed that the said complainants' amended and substituted bill of complaint be, and the same is hereby, dismissed as against the said Western Car Company, and that the said Western Car Company do recover of and against the said last mentioned complainants its costs expended in this behalf, taxed at .

It is further found by the court that of the said ninety cars
179 mentioned in said amended and substituted bill, and in the said lease, fifty-six cars have heretofore come into the possession of the said The Western Car Company under and by virtue of a writ of replevin, lately issued out of the circuit court of the United States for the northern district of Illinois, at the suit of the said The Western Car Company against the Chicago and Northwestern Railway Company, and that thirty-four of said cars are now, and have been since the commencement of this suit, in the hands and possession of the receiver appointed by this court, but that two of the said last-mentioned thirty-four cars, to wit, box car number 187 and stock car number No. 308, are found to be subject to the lien of the deed of trust under which the complainants claim; and thereupon it is further ordered, adjudged, and decreed that the said receiver do immediately surrender and deliver up unto the said The Western Car Company the remaining thirty-two cars, numbered respectively as follows: Box cars 122, 125, 127, 128, 131, 133,
138, 140, 145, 148, 149, 151, 153, 157, 160, 163, 166, 170, 171, 173,
180 174, 176, 177, 183, 184, 186, 192, 194, 195, 198, and stock cars 306, 309.

As to cars No. 139, 144 and 156, the complainants' bill is dismissed without prejudice.

It having been stipulated and agreed in open court by the said parties and their solicitors that the value of the use of the said thirty-two cars, since and while they have been in the hands and possession of and in use by the said receiver of this court, is the sum of ten dollars per car for each month since the month of March, A. D. 1875, a period of twenty-six months, and thereupon it is further ordered, adjudged, and decreed that the said The Western Car Company do have and recover for the use of the said cars the sum of eight thousand three hundred and twenty ($8,320) dollars, and the said receiver is hereby ordered and directed to pay over the said moneys to the said The Western Car Company.

And the said complainants, protesting and objecting to the said findings and the said decree, now here pray an appeal therefrom to
181 the Supreme Court of the United States, it is considered by the court and ordered that an appeal be and *is* the same is hereby allowed, and that upon perfecting their said appeal and filing a bond herein with good and sufficient sureties, to be approved by one of the judges of this court, for the use of the said The Western Car Company

in the sum of fifteen thousand dollars, the execution of this decree do stand suspended and superseded pending the said appeal.

(S'g'd) JOHN F. DILLON, *Judge.*

182 Afterwards, to wit, on the 1 day of July, 1877, there was filed in said clerk's office an appeal bond in said cause, which is in the words and figures following, to wit:

183 Know all men by these presents that we, Lewis H. Meyer, principal, and August Rutten and William B. Bonn, sureties, are held and firmly bound to the Western Car Company in the penal sum of fifteen thousand dollars, to which we bind ourselves and each of us by these presents. Given under our hands this twenty-ninth day of May, eighteen hundred and seventy-seven.

The condition of this obligation is this—

Whereas Lewis H. Meyer and William Dennison have appealed from a decree of the circuit court of the United States for the district of Iowa, in favor of the Western Car Company, in a certain cause therein pending, wherein Lewis H. Meyer and others are plaintiffs, and The Davenport and Saint Paul Railroad Company, the Western Car Company & others are defendants; which decree is rendered therein in favor of the Western Car Company, rendered at the May term of said court, in eighteen hundred and seventy-seven:

Now, if said Meyer and Dennison shall prosecute their said
184 appeal to effect, and if they fail to make their plea good, shall answer all damages and costs which may be thereupon adjudged against them, then this obligation shall be void; otherwise to remain in full force.

L. H. MEYER. [SEAL.]
AUGUST RUTTEN. [SEAL.]
WILLIAM B. BONN. [SEAL.]

In presence of—the word "western" being erased before signing—
A. MANN.

Approved.

JOHN F. DILLON, *Judge.*

185 STATE OF IOWA,
Scott County, ss:

I, James Grant, being duly sworn, depose and say that I am a resident of the State of Iowa, that I am personally acquainted with L. H. Meyer, principal, and August Rutten and Wm. B. Bonn, of New York, sureties in the foregoing bond, and I know that they are worth the sum of thirty thousand dollars beyond the amount of their debts, and that they have property liable to execution in the State of New York equal to the amount of the penalty in said bond.

JAMES GRANT.

Subscribed and sworn to by James Grant before me and in my presence this 24th day of June, 1877.

[L. S.] WHITAKER M. GRANT,
Notary Public, Scott County, Iowa.

(Endorsed:) In the cir. c't of U. S., dist. of Iowa. No. 552, equity.
Moses Dewitt Loomis, Lewis H. Myer, vs. The D. & St. P. R'y Co.
186 & others. Appeal bond in intervening claim of Western Car Company. Filed July 11, 1877. E. R. Mason, clerk.

187 On the same day, to wit, July 1, 1877, there was filed in said clerk's office a citation in said cause, the original of which is as follows, to wit:

188 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Western Car Company:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October next, pursuant to an appeal filed in the clerk's office of the United States circuit court for the district of Iowa, wherein Lewis H. Meyer and others are plaintiffs and you are defendants, to show cause, if any there be, why the judgment rendered against said plaintiffs in appeal, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable John F. Dillon, judge United States circuit court for the district of Iowa, this 18 day of June, A. D. 1877.

JOHN F. DILLON,
Judge.

Service accepted for Western Car Company this 30th day of June, A. D. 1877.

R. G. INGERSOLL,
BROWN & CAMPBELL,
Sol's for W. Car Co.

(Indorsed:) In cir. c't U. S., dist. of Ia. Moses Dewitt Loomis & Lewis H. Meyer vs. D. & St. P. R'd Co. & others. Citation to West. Car Co. 552. Filed Jul. 11, 1877. E. R. Mason, clerk.

189 In the circuit court of the United States for the district of Iowa.

I, Ed. R. Mason, clerk of the said court for said district, do hereby certify that the foregoing transcript contains full, true, and complete copies of the bill of complaint, answer of Western Car Co., amendment to bill, answer to amendment, amendment to answer to amendment to bill, replication to same, petition of Western Car Company, answer to same, agreed facts, depositions, record entries, final decree, and appeal bond in a certain cause wherein Lewis H. Meyer et al. are complainants and Western Car Company et al. are defendants.

I further certify that the original citation, with return of service endorsed thereon, is hereto attached and herewith returned, the said copies being as full, true, and complete as the originals of the same now remain on file and of record in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at my office in Des Moines, in said district, this 27 day of September, A. D. 1877.

[SEAL.]

E. R. MASON,
Clerk U. S. C. C., District of Iowa.

(Indorsement on cover:) No. 262. Lewis H. Meyer & William Dennison, trustees, appellants, vs. The Western Car Company. Iowa C. C. U. S. Filed 10th October, 1877.

OFFICE SUPREME COURT U. S.
FILED
MAR 2 1880
D. W. MIDDLETON, Clerk.

SUPREME COURT OF THE UNITED STATES.

No. 262.

LEWIS H. MEYER, *et al.*, *Appellants*,

vs.

THE WESTERN CAR COMPANY, *Appellee.*

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

ARGUMENT FOR APPELLANTS,

BY

GRANT & GRANT.

FILED

SUPREME COURT OF THE UNITED STATES.

No. 262.

LEWIS H. MEYER, *et al.*, *Appellants*,

vs.

THE WESTERN CAR COMPANY, *Appellee*.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

ARGUMENT FOR APPELLANTS.

Statement of the Case.

This controversy arises out of a foreclosure suit of Meyer & Dennison, Trustees of a mortgage given by the Davenport & St. Paul Railroad Company, to secure three millions of bonds, and to aid in the construction of said railroad, executed on the 1st of July, 1871. To this bill the Western Car Company was made a party (see record, page 1).

The controversy between the Trustees under this mortgage, recorded in all the counties through which the road runs, from February 8th to June, 1872 (see record, page 3), and the Western Car Company, arises in this way: The Davenport Railway Construction Company made a contract to iron and equip the road for $20,000 per mile of the bonds sought to be foreclosed. On the 9th of February, 1872, the Davenport & St. Paul Railroad Company, by George H. French, its President, made a contract with the Davenport Railway Construction Company, by B. E. Smith, its President (see record, page 31), in which it was admitted that the furnishing of rolling stock was not provided for, in the contract of May 12, 1871, and the Construction Company agreed to furnish rolling stock for the use of the said railroad, as might be necessary for local traffic, and the same was to be subject to the first mortgage bonds, and to hold the

cost and interest on the same, against the said Railroad Company, for future payment.

The plaintiffs aver, in their bill, that the Construction Company, instead of furnishing the equipments as part of the property of the road, leased ninety cars of the Western Car Company (see bill, page 7); that the Construction Company, by its contract, owned a majority of the stock of the road, and controlled it; that the Construction Company and the Car Company knew the Construction Company were bound to furnish said cars, and the contract of lease, instead of purchase, was a fraud on the creditors of the Railroad Company, and that the Construction Company is bound to pay the cost of the cars, and refund the money they had paid on the lease out of the earnings of the Railroad Company (see bill, pages 6 and 7).

The Western Car Company answered the bill, and set up its lease in writing, and claiming rental for said cars, and denying that it knew of the Construction Company's agreement to furnish the cars, and that the said Railroad Company had the right to make the lease, and that it was a legal and binding contract (Record, page 9).

The plaintiffs amended their bill as to the Car Company (record, page 13), alleging that the contract for the lease of said ninety cars was made on the 21st of October, 1873. That the lease recites, that the cars, having been the property of the Western Car Company Association, and delivered by them to the Davenport & St. Paul R. R. Company previous to Feb. 1st, 1873, as per receipts of the Railroad Company, and the ownership being afterwards transferred to the Western Car Company. The amendment averred that said ninety cars had, before October 1st, 1873, been delivered to the Railroad Company on a contract of sale, and had been in the use and possession of said company at and prior to February 1st, 1873; that it was recited in the contract of lease that the ownership of the cars had been transferred, after the delivery to the Railroad Company, to the Western Car Company, and by that instrument sold, with a condition, to the Railroad Company. That there was no change of possession by said contract of October 1st, 1873, and said cars had always been, after the delivery, in possession of the Railroad Company. That the cars, on the delivery, became the property of the Railroad Company, as part of the equipment referred to in the mortgage, which covered all future acquisitions of cars by the company. That the mortgage became

defaulted for non-payment of interest, and the property included in it was taken possession of by the Receiver of this Court.

That the contract of October 1st was never recorded, as required by the laws of Iowa, and the title under the same is void as to the plaintiffs, creditors of said Railroad Company (see record, page 13).

To this amendment there are two answers (pages 14, 15, and 16), by the Car Company: Denying that any contract was made with the Construction Company; admits that the cars had been delivered to the Railroad Company by the Western Car Company Association, and that the Western Car Company is its successor. That the recital in the lease referred to a transfer by the Western Car Company Association, and not by the Railroad Company: denies that the cars were ever in possession of the Railroad Company under sale of any kind, but under a lease, similar to the one of October 1st, 1873.

The amendment to answer (page 15), denies a sale was converted into a lease; denies the recital in the lease; avers that the recital refers to a transfer by a corporation by another name; denies that said cars were ever owned by the Railroad Company, under a contract of sale. Avers that when the Western Car Company became the owners, it became possessed of the same, and delivered the same to the Railroad Company; admits that the lease was never recorded.

Replication to strike answer was filed (page 17).

A cross-bill was filed by the Western Car Company (page 20), alleging that on October 1st, 1873, it was a corporation, and the owner of ninety cars; which, on application, it leased to the Davenport & St. Paul Railroad Company by a lease, to which reference is made; that the Railroad Company took possession of said cars, by virtue of said lease, and under the same, until French was appointed Receiver; that on March 10th, 1874, the Car Company took possession of fifty-six of said cars, and there was then due for rent $15,000. That no rental has been paid, and there is now due $11,000; praying for a delivery of thirty-four cars, and the payment of rent.

The plaintiff Meyer answered this cross-bill, requiring proof that the Western Car Company was a corporation, denying that on the 1st of October, 1873, the Western Car Company was the owner of ninety cars, marked as alleged; alleging that the cars were delivered to the Railroad Company between July 15th, 1872, and February 15th, 1873, under a contract of lease and

conditional sale, which was never recorded, and rent was paid therefor to the Western Car Company Association to a large amount, but that by said delivery and possession became the property of the Railroad Company and subject to the plaintiffs' mortgage. That it is true the lease referred to was made on the 1st of October, 1873, but it is not true that the Railroad Company took possession under said lease. It had possession previous to the contract. It is true that it used them in its business up to the appointment of the Receiver. Denies that the Car Company took possession of sixty-six of said cars, leaving thirty-four in possession of the Receiver. Denies that anything was due for rent.

The answer sets up, that in December, 1874, French, a member and stockholder of the Western Car Company, and a Director in the Railroad Company, was appointed Receiver, and claimed said cars as subject to said mortgage, and when the Car Company applied to this court for payment of rent, and it was refused, the Car Company obtained fifty-eight of said cars, by writ of replevin, from the Chicago & Northwestern Railroad, while they were in transit to be returned to said Receiver, and that was a possession in contempt of the court; that said contract of 1st of October was void in law; that when it was executed B. E. Smith was President of the Car Company, Secretary of the Construction Company, and Director in the Railroad. That French was President of the Railroad, Director and Secretary of the Construction Company, and stockholder in the Car Company. (See Record, pages 21, 22, 23.)

To this answer there was no replication, and the facts therein alleged are thereby admitted.

It was agreed upon Record page 23 that the cars were delivered to the Railway Company under a conditional contract or lease, by the Western Car Association, between the 8th of February, 1872, and the 15th of February, 1873; $22,179.02 was paid for rental prior to October 1st, 1873.

At or prior to October 1st, 1873, the Western Car Corporation was formed, and the contract of October 1st, 1873, was executed, and the words in that contract, "having been the property of the Western Car Company Association, and by them "delivered to the said Railroad Company, mentioned in the contract of October 1st, 1873, refer to the delivery above named, "and the Western Car Company claim title to and rental for "the cars under the contract of October 1st, 1873."

2. That the Trustees of the bondholders claim title under the mortgage of the 1st of May, 1871, and amendments, which are duly recorded as set out in Meyer's bill.

3. That the contract of October 1st, 1873, was never recorded. That the Receiver has paid no rent. The cars were marked W.

4. That the cars were all in use in the business of the road from their delivery; and were constantly passsing in and for the road to Chicago and back, up to the Receiver's appointment. Some parties garnished the cars, against the Northwesteru road, and upon application of this Court an order was made to deliver the cars to the Receiver. Before this order was executed, the Western Car Company applied to this Court for rent; which was refused, and the Car Company replevined fifty-eight of the cars from the Northwestern Company, in the United States Circuit Court at Chicago.

5. It was admitted, that when the contract of October 1st, 1873, was executed, B. E. Smith was President of the Western Car Company, Director and President of the Davenport Railway Construction Company, and stockholder in the Railroad Company. French was President of the Davenport & St. Paul R. R. Co. and Secretary of the Construction Co. The cause was tried on the testimony of Conner and others, (record, page 26), who annex a copy of the contract of lease (record, page 29), and of the contract of the Construction Company to furnish cars, and the same were to be subject to the mortgage, and this was a supplement to the Construction Company's contract of May 12th, 1871, which is fully set out in the bill of foreclosure suit (page 8).

This witness proved that the Construction Company took possession of the Davenport & St. Paul road on July 1st, 1872, and used it and received its income up to the Receiver's appointment, and owned a majority of its stock. There was no contract for operating the road.

The contract of lease for cars (page 83), recites that "said ninety cars having been the property of the Western Car Company Association, and by them delivered to the party of the second part (the Railroad Company), and the ownership of said cars having been afterwards transferred to the party of the first part; it is understood that the said cars are to be used by the Railroad Company in its regular business of transportation over its own and other roads for the time of five years, to be renewed in like agreements on the request of either party; the

Railroad Company were to pay a rental of twenty dollars per car per month. If destroyed, the Railroad Company was to renew them; to keep the cars in repair; and renewed the privilege at any time during the existence of the contract of purchasing the cars, on payment of the original cost."

The contract contained an express clause to evade the mortgage deed, in these words: "In case the Railroad Company fails to pay interest or principal of its bonds, the Car Company could terminate the contract and demand the return of the cars."

The Court record (page 43), dismissed the plaintiffs' bill, and rendered a decree on the cross-bill, for the value of thirty-two cars, dismissed the bill as to three cars, without prejudice, and rendered a decree for the use of the cars.

And the plaintiffs appealed.

We assign for error in this decree:

1st. That the Court erred in dismissing the plaintiffs and rendering a decree for the Western Car Company on the cross bill.

2d. That the Court erred in not rendering a decree that the contract of lease was was void in law, fraudulent in law, and the cars held subject to the mortgage.

ARGUMENT.

I.

The contract of lease was fraudulent and void under the following Act of the Legislature, which we print here in full, instead of at the end of the brief.

Chapter 63; Acts 14th General Assembly, page 69; copied in the Code of 1873, page 336, § 1922:

"AN ACT requiring conditional sales of personal property to be executed, acknowledged and recorded, like mortgages of personal property, to be of any validity as against *bona fide* purchasers, executors and attaching creditors.

"SECTION 1. Be it enacted by the General Assembly of the State of Iowa, that no sale, contract or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any creditors or purchaser of the ~~title deed~~ or lessee, in actual possession, obtained in pursuance thereof, without notice, unless the same be in writ-

ing, executed by the vendor or lessee, and recorded, the same as a chattel mortgage."

We also print here the following parts of the Code of Iowa, since the 11th General Assembly, in relation to railway mortgages, Code of Iowa, page 226, sections 1283, 1284, 1285, in relation to railway corporations.

SECTION 1283. Any such corporation shall have power to issue its bonds for the construction and equipment of its railway, in sums not less than fifty dollars, payable to bearer or otherwise, and bearing interest at a rate not exceeding ten per cent. per annum, and make the same controvertible into stock, and may sell the same at such rates or prices as is deemed proper; if such bonds are sold below the par value thereof, they shall, nevertheless, be valid and binding, and no plea of usury shall be allowed such corporation in any action or proceeding brought to enforce the collection of said bonds; such corporation may also secure the payment of said bonds by executing mortgagees or deeds of trust of the whole or any part of its property and franchise.

SEC. 1284. Said mortgages or deeds of trust, may, by their terms, include and cover, not only the property of the corporation making them at the time of their date, but property both real and personal which may thereafter be acquired, and shall be as valid and effectual for that purpose, as if the property were in possession at the time of the execution thereof.

SEC. 1285. Said mortgages or deeds of trust shall be executed in such manner as the articles of incorporation or by-laws of the corporation may provide, and shall be recorded in the office of the recorder of each county through which the railway of the corporation may run, or in which any property mortgaged or conveyed by such deeds of trust may be situated, and shall be notice to all the world of the rights of all parties under the same, and for this purpose, and to secure the rights of mortgagees or parties interested under deeds of trust so executed and recorded, the rolling stock and personal property of the company, properly belonging to the road and appertaining thereto, shall be deemed a part of the road, and said mortgages and deeds so recorded, shall have the same effect, both as to notice and otherwise, as to the personal, as to the real estate covered by them.

We make this reference to the railway mortgage law of Iowa, because we know that the case of United States *vs.* New

Orleans Railroad, 12 Wallace, 364, will be cited against us. In that case this court held that a mortgage intended to cover after acquired property can only attach itself to such property in the condition in which it comes into mortgagor's hands. It only attaches to such interest as the mortgagor acquires. If he purchase property and gives a mortgage for the purchase money, the deed which he receives and the mortgage which he gives are regarded as one transaction, and no general lien impending over him, in the shape of a general mortgage, judgments or recognizance can displace such a mortgage for purchase money. A failure to register the purchase money mortgage makes no difference.

Had the property sold by the Government to the Railroad Company been rails, as in the case of Galveston Railroad Company *vs.* Cowdry, or other material, which became affixed to and a part of the principal thing, the result would have been different. This latter clause of the opinion is the only way of reconciling the case in 12 Wallace with the Cowdry case, in the 11 Wallace, or Dunham *vs.* the Railroad Company, 1st Wallace, 254.

But we argue that the act of the Legislature of Iowa entirely takes the case out of the general propositions laid down in the 12th Wallace, for the reason that it is a positive enactment of law, making any sale or lease dependent on any condition, absolutely void against creditor or purchaser of the vendee in possession without notice to the creditor, unless the sale, contract or lease was recorded as a chattel mortgage.

This Iowa statute was passed in consequence of a decision of the Supreme Court of Iowa, Burley *vs.* Harris, 8 Iowa, 331, 9 do 91, and 15 do 277, that where there was a conditional sale of a chattel, the vendee took no title, and a sale by him while in possession conveyed no title to a third person, who had no notice of the conditional sale.

The act of 1872 being a positive statute of Iowa, making such a sale void, as to a creditor of the vendee, it seems to us that to reverse the judgment below, it is only necessary to enquire, was the sale, contract, or lease of the ninety cars, one where the title or ownership of personal property was made to depend upon any condition?

There were several conditions annexed to the lease of October 1st, 1873 (record, page 33): First, the lease could be renewed at the end of five years. Second, if any of the cars were

destroyed, they were to be replaced by the vendee. Third, they were to be kept in repair by the vendee, and returned in good condition. Fourth, there was a condition that the vendee might purchase at any time during the lease.

5. There was a condition that the contract could be annulled if the vendor neglected to pay interest on its bonds.

Here were five conditions annexed to this contract, one of which was that a leasehold might be converted into an absolute title. This contract was void as to the mortgagors, because never recorded.

See F. L. & T. Co. *vs.* Denver R. R. Co., 3 Dillon, 412.

There is another reason which brings the sale of these cars under the exception mentioned by the Court in the Galveston case, by the express words of the railroad mortgage law.

Railroads in Iowa (see Code, 235, § 283,) are authorized to mortgage their property only for their construction and equipment. In these mortgages (§ 1284,) they may include not only property owned at that date, but property real and personal after acquired, and the mortgage is as valid and effectual for that purpose as if the property was then in possession; (and § 1285,) the recording of the mortgage is notice to all the world of the rights of the parties under the same, and for this purpose, and to secure the rights of mortgagees in parties interested under such deeds of trust, the rolling stock and personal property shall be deemed a part of the road, and the said mortgages and deeds so recorded shall have the same effect as to the personal as real estate covered by them.

This statute puts these cars entirely under the decision of this Court, in Galveston *vs.* Cowdry, 12 Wallace, 459; and the reason of the first part in the opinion in 12 Wallace does not apply to it.

Since this case was decided by the Circuit Court, the Supreme Court of Iowa has interpreted the act of 1872, in relation to conditional sales, contracts, or leases.

In Singer Sewing Machine Company *vs.* Holcomb, 40 Iowa Reports, page 33, the head note of the case is this:

"A written contract of a lease of a sewing machine provided for payment, within a certain specified time, of an amount equal in value to the machine. Parol evidence was admitted to show, that, upon compliance with the terms of the lease, the title vested in the lessee.

" Such a contract must be recorded to be valid against a subsequent purchaser, or creditors."

Justice Dillon, in a case before him, decided just the reverse of his opinion in this case, holding, in Pittsburg Locomotive and Car Works *vs.* State National Bank of Keokuk, vol. 2, Central Law Journal, page 692: " A locomotive was leased to a railroad cor- " poration in Iowa, by an instrument in writing, not recorded, " for a sum equal to its value, to be paid in nine months. The " lessee pledged the locomotive to a bank to secure a loan of " money. Held, under § 1922, of the Code of Iowa, 1873, which " requires contracts for conditional sale to be recorded, in order " to be valid against creditors and subsequent purchasers, with- " out notice, the pledgee's title was superior to that of the man- " ufacturer."

II.

This cause should be reversed, because this lease is fraudulent upon other grounds.

B. E. Smith was President of the Western Car Company; was President of the Construction Company, and a stockholder in the railroad; George H. French was President of the Railroad Company and Secretary of the Construction. The Construction Company had agreed to build the road; and by agreement, dated February, 1872, agreed to furnish cars sufficient for the local traffic of the road, which should be subject to the first mortgage bonds. (Record, page 31.)

In October, 1873, Smith, as President of the Western Car Company, with a full knowledge of this contract of the Construction Company, agreed with French, President of the Railroad and Secretary of the Construction Company, to lease cars to the road with an enormous rent, and a conditional right to purchase them. Smith had, as a Trustee and President of the Construction Company, assumed a duty in relation to the railroad at variance with his duty as a Trustee of the Car Company. French, like Smith, was a Trustee for the Railroad and Construction Companies.

These parties all know their duties; they have knowledge of these contracts, and they go to work and make a contract with Smith, President of the Car Company, in direct violation of the trust assumed by them. The doctrines of equity, laid down in

Aberdeen Railway Company *vs.* Blaikee Brothers, apply to such a contract and declare it void.

1 McQueen's Reports of the House of Lords, 461.

See Jackson *vs.* Ludelling, 21 Wallace, 616.

And Wardell *vs.* Union Pacific R. R., 4 Dillon, 330.
(Opinion by Justice Miller.)

See also Panama *vs.* India Rubber Co., 10 Law Reports, Chancery Appeal Cases, 516, and cases there cited.

The director of a railway company is a trustee, and as such is precluded from dealing in behalf of the company with himself, or with a firm of which he is a partner.

It is a rule of universal application that no trustee shall be allowed to enter into engagements in which he has or can have a personal interest conflicting, or which may probably conflict, with the interest of those whom he is bound by judiciary trust to protect.

So strictly is this rule adhered to, that no question is allowed to be raised as to the fairness of the transaction.

No enquiry into the fairness of the matter is permitted.

The Construction Company agreed to furnish these cars and subject them to this mortgage; but so intent was Smith, the President, in perpetrating a fraud on these bond creditors, that he stipulates in his contract of lease, that if the Railroad Company, French, President, and Secretary of the Construction Company agreeing thereto, made default in payment of interest on the bonds, the contract may be cancelled.

The whole transaction is a fraud in law, as well as fraudulent in fact, and the judgment of Court below is erroneous.

GRANT & GRANT, *for Appellant.*

OFFICE SUPREME COURT U. S.
FILED
APR 12 1880
D. W. MIDDLETON, Clerk.

IN THE

Supreme Court of the United States.

No. 262.—October Term, 1879.

Lewis H. Meyer et al., Appellants,
vs.
The Western Car Company, Respondents.

Additional Points for Appellants.

Facts.

The cars in dispute were received and held by the railroad company, under an agreement in writing dated Oct. 1, 1873, by which it purported to hire them at a rental of *twenty* dollars apiece per month, to be kept in repair and running order, and renewed if destroyed at the expense of the railroad company, "it being understood and agreed between the parties to this contract, that said second party (the railroad company) may and hereby reserves the privilege of purchasing said cars at any time during the existence of this contract, or the renewal of this contract, if renewed, by paying or securing to be paid to the said first party, to its satisfaction, the original cost thereof."

The parties stipulated (p. 23) that this was a *conditional* contract or lease, and (p. 43) that the value and use of the cars by the receiver since March, 1875, is *ten* dollars per car per month.

The appellants' mortgage covering all after-acquired property of every kind was prior in date of execution and of record to the contract for the cars and the company's possession under it.

The statute under which the appellants claim that their mortgage holds the cars, as against the respondent, is as follows:

"Acts 14th General Assembly, p. 69.

"An act requiring conditional sales of personal property to be executed, acknowledged, and recorded like mortgages of personal property, to be of any validity as against bona fide purchasers, execution and attaching creditors.

"SECTION 1. Be it enacted by the general assembly of the State of Iowa, that no sale, contract, or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against *any creditor* or purchaser of the vendee or lessee in actual possession obtained in pursuance thereof, without notice, unless the same be in writing, executed by the vendor or lessee, and *recorded* the same as a chattel mortgage."

The contract or lease under which the cars were received and held was never recorded, and it is not pretended that the appellants had any notice of it.

POINTS.

First Point. By the true and fair construction of the statute its terms apply to the case proved and invalidate the title or right of recovery of the lessors, as against the prior mortgagees. It makes the title of the creditor superior to that of the actual owner.

a. The title of the act does not control the enacting clause by which the benefit of the act is given to "*any creditor,*" the words of the enacting clause being free from all ambiguity.

Potter's Dwarris on Statutes, pp. 265–270.

Mace vs. Cadell, Cowp., 232.

Sedgwick on Statutes, pp. 50–52.

b. Although this court held in *United States vs. New Orleans*, 12 Wallace, 362, that as a general rule of equity the mortgagee in such a mortgage must take after-acquired property *cum onere*, the express terms of this statute create a clear exception to that rule, and so the United States circuit court in Iowa has held. *U. S. W. Engine Co. vs. Burlington, &c., Railway Co.*, 4 Dillon, 579, was a similar case, and the court said: "The railway mortgages were executed and recorded prior to the delivery of the engines not paid for and cover all after-acquired property pertaining to the railway. These engines are on the right of way, are essential to the use of the railway, and are part of it. They fall within the property embraced in the mortgage. But it is claimed that as to after-acquired property the mortgagee must take it *cum onere*, (U. S. vs. New Orleans, *ut sup.*,) and as the stipulation as to title being retained by the seller is good between the parties, it is likewise good as to the mortgagee or trustees. Treating these engines as in the nature of personalty or removable fixtures, I am inclined to think, aside from the requirements of section 1,922 of the Code, that this position would be sound. But the mortgagees are creditors of the railroad company and such verbal unrecorded agreements are declared to be invalid against "*any creditor*" (prior or subsequent) without notice, and are probably ineffectual as against the trustees of the railway mortgage in actual possession under the mortgage."

c. The contract in question comes directly within the terms of the statute. It is "a contract or lease wherein the transfer of title or ownership of personal property is made to depend upon a condition" and the "lessee or vendee was in actual possession, obtained in pursuance of the contract without notice."

The condition contained in the contract on which the transfer of title in the cars to the lessee is made to depend is the payment of the original cost. At any time during

the lease, by performing this condition, he is to become the owner of the cars.

The purpose of the statute is to be considered. Like all similar statutes which aim at prohibiting the separation of the apparent or reputed title from the real ownership, it is to be construed liberally for the prevention of fraud upon creditors and others who rely upon the apparent ownership, which the possession and use of chattels indicate. Had an actual purchaser, relying upon this, bought and paid for the cars, there can be no question that his title must be sustained as against the real owner, and the statute expressly puts "*any creditor*" in the same position.

Under the statutes of Elizabeth, an absolute conveyance unaccompanied by delivery and continued possession in the purchaser was invalidated in the same way. Under the statute of 21 James I., the reputed ownership manifested by possession in a bankrupt at the time of bankruptcy passed the title to the assignee as against the real owner, and in both cases although the real owner had received nothing for the property.

The principle of all such statutes is that a divorce of the apparent ownership, manifested by possession, from the actual ownership, raising a secret trust for the real owner, shall not avail as against creditors who rely upon the possession.

In *Twyne's* Case, 1 Smith's Leading Cases, it was resolved by the whole court that all such statutes made against fraud must be liberally and beneficially expounded, and that the whole instrument must be taken together to ascertain its meaning.

The statute of Iowa does not require a consummated and binding sale and purchase. What it does require, is a contract or lease, wherein the transfer of title to the lessee is made to depend upon a condition, and this exact feature is found in the contract in evidence. For the agreement is that whenever the lessee puts up or secures the money representing the original cost, the cars are to

be its property. It is not a mere offer. It is an agreement binding during the whole term of the lease, and acceptance of it is not necessary or required by the statute. Acceptance would be the performance of the condition, and the statute dispenses with the performance of the condition in favor of creditors in case the contract, as here, is not recorded.

Leases wherein payment of rent is stipulated for to the amount of a purchase-price fixed, have frequently been held to be within the statute. That is the same condition with the performance regulated in a different method.

Sewing Machine Co. vs. *Holcomb*, 40 Iowa, 33.
Pittsburg, &c., Co., vs. *Bank of Keokuk*, 2 Central Law Journal, 692.
Lucas vs. *Campbell*, 88 Ill., 449.
Latham vs. *Sumner*, 89 Ill., 235.
Mosely vs. *Shattuck*, 43 Iowa, 541.
Hervey vs. *R. I. Locomotive Wks.*, 3 Otto, 644.

The distinguishing feature of those cases is that the rent which the lessee is bound to pay is paid and received as the purchase-money, and that when the lessee has performed the condition on which the transfer of title is made to depend, by paying the whole amount, the property becomes his.

But that is not the only case that the statute of Iowa provides for. It covers every case where the contract under which possession is taken contains a condition on the performance of which the title is to pass to the party in possession. And it does not require that he should be bound by the contract to perform the condition.

A conditional sale does not require a mutual and binding agreement of sale and purchase; it means an agreement of sale, provided the contemplated purchaser performs the condition named, and the authorities for this proposition are conclusive.

Horn vs. Baker, 9 East., 215, is the leading case. The statute of 21 James I. made the reputed ownership of goods

and chattels in the possession of bankrupts at the time of bankruptcy, the real ownership, and subjected them to the debts of the bankrupt. The plaintiff's testator had leased the vats and utensils in a distillery occupied by the bankrupts, and instead of reserving rent, he reserved an annuity payable to himself and his wife, and the survivor of them, with liberty to the lessees to purchase these articles on the death of such survivor; and it was held that the statute applied to pass the property to the bankrupts' assignees. Lord ELLENBOROUGH said: "There is nothing stated in the case which qualifies the reputed ownership which arises out of the possession and use of the things in their trade. The rule would naturally give credit to the traders on their reputed property, and the person who permitted them to hold out to the world the appearance of their being the real owners ought to be answerable for the consequences, and was so intended to be by the statute. *Here, in fact, the bankrupts were only lessees of these goods, but that was a secret known only to the parties themselves, and nothing appeared to teach the world that the bankrupts could not bind the property to the full extent of it.* The principle is that in all cases where, by the consent and permission of the true owner of goods, a trader in possession has the apparent ownership, and incidental to that, the order and disposition of them, and no other circumstance appears to control such apparent ownership and show that the trader was not the real owner, the true owner permitting the trader to exhibit this appearance does it at his peril."

The court will observe that this case presented the exact features of the case at bar. The bankrupts were lessees and received and held possession under the lease, and there was no binding agreement on their part to perform the condition. They were not bound to buy. They had only the privilege of doing so at their option, and the sum to be paid was wholly distinct from the annuity which constituted the rent.

And the leading American cases are equally explicit to the same effect.

In *Strong vs. Taylor*, 2 Hill, 326, NELSON, Ch. J., S. agreed to sell to D. a canal-boat for $300, provided that amount should be paid by D. in freighting wheat and flour on the canal, under direction of S. *Held*, a conditional sale, and the language of the court is directly applicable to the case at bar. "But as the property did not pass to D. the boat was to be thus possessed and used by him as the boat of S., to become the property of D. on his paying the price in the manner contemplated. The sum of the whole case is this: The right of D. rested in contract, and contract only, by which he might at a future day acquire an interest in the property; but, till the fulfillment of the condition, *i. e.*, payment of the purchase-money in the mode pointed out by the contract, nothing passed."

Herring vs. Willard, 2 Sandf. Supr. Ct., 418, OAKLEY, Ch. J., a safe was delivered under an agreement that on paying a note given for the price it should be the property of the bailee; but in case of default "said Herring is hereby authorized to enter our premises and take and remove said safe, and we agree to pay said Herring for use of said safe and all reasonable charges." *Held, to be a conditional sale.* The language of the court applies exactly here. "We have no doubt, under the circumstances, that Herring is entitled to the property. *There was not only a conditional sale, but a conditional delivery also.* In effect the arrangment was only a letting of the safe to Young & Co., to be reclaimed if they did not pay the price fixed upon, and in that event they were to pay rent for its use. *It is exactly the case of leasing personal property, such as the furniture of a house, for permanent use, with the addition of an agreement to sell it at a future time, on receiving a stipulated price.*"

In the light of these cases it is clear that a *present sale*, mutually binding, is not necessary to a *conditional sale;* that the condition on performance of which the sale is to take place, may be quite distinct from the payment of the rental reserved by the lease; and that an option given in the contract of lease to become the owner on the pay-

ment at his election of the sum stipulated is sufficient. Under this statute of Iowa, the one essential thing is that the contract, under which possession is received and held, contains a condition on performance of which the party holding such possession may become the owner, and that is exactly this contract.

c. The case of *Fosdick vs. Schall*, 99 U. S., 235, is in no way inconsistent with this proposition. That case went no further and decided nothing else than had already been decided in *United States vs. New Orleans Railroad*, 12 Wallace, 362. Indeed it is expressly based, in the opinion of the learned Chief Justice, upon that decision. Both cases hold that, upon the general principles of equity, a general mortgage covering after-acquired property, covers chattels after-acquired only subject to all conditions on which the mortgagor acquires them, and that it takes them *cum oncre*, and the *Fosdick* case holds further, that the Illinois statute, which it was construing, does not alter this general rule of equity, that when that statute said that the lien should not be "valid as against the rights and interests of any third persons," it did not enlarge the rights of any such third persons, and that prior mortgagees were not the "third persons" intended by the statute. But there is a world-wide distinction between that statute of Illinois and the statute of Iowa now under consideration, which, as has been held in the Circuit Court of Iowa, in the case already cited, (4 Dillon, 579,) does expressly depart from the general rule in equity, and in the term, "any creditor," does place prior creditors, prior mortgagees in the same position as attaching creditors and *bona fide* purchasers, thereby enlarging their rights, and giving them the property discharged of the burden reserved by the contract containing the condition on performance of which the title is to pass, in case that contract is not recorded.

The court must take the statute of Iowa as it finds it. It cannot legislate for Iowa, nor annul the express provisions of its statutes to palliate the supposed hardships of

the particular case. This it would do if it held that the appellants were not "any creditors," in the sense of that act.

d. The lease in question was not merely a lease. It contains the extraordinary provision that the lessee might at any time during the lease become the owner of the leased property on payment of the original cost. Is not some light shed upon this singular provision by the stipulation of the parties in the court below that the actual value of the rental of the cars was only ten dollars per car per month, just one-half of the rental reserved by the lease? Doubtless, therefore, long before the receiver took possession, the lessor had received in excessive rental the full original cost of the cars, and the plea of hardship in losing the cars wholly fails. There is no hardship except in the decree which takes from the mortgagees the cars after the mortgagor had once fully paid for them out of the earnings of the road.

Second Point. Under the peculiar circumstances of the case, the contract for the rental of the cars was constructively fraudulent and void at the instance of the railroad company and of the appellants, its mortgagees.

(Vid. authorities cited in Judge Grant's brief, p. 11.)

a. Though nominally a contract between the car company and the railroad company, it was actually made between the car company and the *construction* company. For (Record, p. 27) the construction company was in possession of and operating the railroad all the time, managed its affairs and received its entire income, and paid the stipulated rental out of the income which was covered by our mortgage. The railroad company never had possession of its road or of these cars.

b. French was president of the railroad company and secretary of the construction company. Smith was presi-

dent of the car company and president of the construction company.—(Record, p. 24.) The construction company was plainly a trustee for the railroad company and for all parties interested in it. Equity would not suffer it or its president and secretary to plunder its *cestuis que trusts*. But French, secretary of the trustee company and president of the *cestui qui trust*, makes with the president of the trustee company the contract for rental which had that direct object and effect.

c. For it is admitted that the rent reserved, and paid and to be paid out of the income of the *cestui que trust* was unconscionable, being twice what it ought to have been—twenty dollars per month per car, instead of ten, on ninety cars. That is to say, by the operation of the contract $900 per month was fraudulently taken out of the income of the railroad belonging to these mortgagees, and was realized under the contract by the car company.

d. Surely, the court of equity, having all the parties before it, is not powerless to redress this wrong. Its duty is clear to adjudge the contract void, and if it finds the extra rent thus fraudulently paid and taken out of the income of the road to be equal to the original cost of the thirty-two cars in question, it should give the mortgagees the benefit of the conditional clause for purchase by applying the extra rent on that account, and declaring the condition fully performed. The record contains no evidence as to what was the original cost of the cars, but in transmitting the case to the circuit court it can direct that to be ascertained and the rights of the parties adjusted.

Third Point. If the propositions we have above contended for are sound, the decree of the circuit court should be reversed, both as to the surrender of the cars and as to the sum adjudged to be paid as rent after they came to the possession of the receiver.

JOSEPH H. CHOATE,
For Appellants.

OFFICE SUPREME COURT U. S.
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D. W. MIDDLETON, Clerk.

IN THE

UNITED STATES SUPREME COURT.

OCTOBER TERM, A. D. 1879.

No 262.

LEWIS H. MEYER, ET AL.,
Appellants,
vs.
THE WESTERN CAR COMPANY,
Appellee.

Appeal from the U. S. Circuit Court for the District of Iowa.

Argument in Behalf of Appellee.

By JOHN M. BUTLER,

SOLICITOR.

INDIANAPOLIS:
Baker & Randolph, Printers, Binders and Blank Book Manufacturers.
1880.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 262.

LEWIS H. MEYER AND WILLIAM DENNISON, *Trustees*, *Appellants*,
vs.
THE WESTERN CAR COMPANY, *Appellee.*

Appeal from the Circuit Court of the United States, for the District of Iowa.

BRIEF OF APPELLEE.

I.

In February, A. D. 1872, the Western Car Company Association—then a co-partnership, leased, by written contract, ninety cars to the Davenport & St. Paul Railroad Company. In May, A. D. 1873, the Western Car Company Association became a corporation under the name of Western Car Company, by virtue of a charter granted by the state of Delaware. The Western Car Company succeeded to the ownership of all the prop-

erty, contracts and rights of the Western Car Company Association.

The Davenport & St. Paul Railroad Company paid the rent stipulated in its contract with the Western Car Company Association, up to October 1, 1873.

On October 1, 1873, the Western Car Company and the Davenport & St. Paul Railroad Company, entered into the following contract, which is set out three times in the record. (See record, pp. 29, 33, 35).

"ARTICLES OF AGREEMENT, concluded this first day of October, A. D. 1873, by and between the Western Car Company, party of the first part, and the Davenport & St. Paul Railroad Company, party of the second part, *witnesseth:*

"That for and in consideration of the promises and agreements of the said second party hereinafter mentioned, the said first party hereby hires to said second party 90 (ninety) railroad cars, as follows, viz: 80 (eighty) box cars Nos. 121 to 200 (inclusive) and 10 (ten) stock cars Nos. 301 to 310 (inclusive), said ninety cars having been the property of the Western Car Company Association, and by them delivered to the party of the second part, at dates previous to February 15, 1873, as per receipts of said second party, and the ownership of said cars having afterward been transferred to the party of the first part, all of said cars being marked **W.**

"It is understood and agreed by the parties hereto, that the said 90 (ninety) cars are to be used by said second party in its regular business of transportation, over its own and other railroads, for the term of five

years from the date of this contract, which shall be renewed on the expiration of the said five years, on like agreements and conditions as those of this contract, upon the request of either of the parties hereto, a written notice of such request to be given by the party making it, on the other party, not less than one year previous to the expiration of said five years.

"In consideration whereof, the said second party hereby promises and agrees—

"*First.* To pay the said first party as rental for the use of each of said cars, twenty dollars for each and every month during the existence of this contract and its renewal, if renewed; said payments to be made to such person on behalf of said first party, as it shall designate in writing from time to time, and until otherwise so designated to the secretary of said first party; and the receipts of such payments of said person so designated, or said secretary of said first party, as the case may be, shall be the only evidence of such payments said first party shall require of said second party therefor.

"*Second.* In case any of said cars shall be destroyed or so disabled, by accident or otherwise, as to be unfit for safe and proper use, at any time during the existence of this contract or the renewed contract, if renewed, the said second party shall, at its own expense, immediately replace such destroyed or disabled cars, with an equal number of like cars, of equally good material, construction, and value, in all respects as were those so destroyed or disabled before the destruction or disabling of the same, and shall have said replacing

cars numbered, lettered and marked as were the said destroyed or disabled cars. Each and all of said replacing cars shall become and be the property of said party of the first part, the same as were the destroyed or disabled cars they shall have replaced.

"*Third.* The said second party shall, at its own expense, maintain and keep each and all of said 90 cars, during the existence of this contract and its renewal, if renewed, in good repair, and in safe and proper running order, and, at its own expense, furnish all the material for and make all renewals of said cars from time to time as they shall be needed, to put and keep them in proper condition for regular use; said material to be in every respect equal in quality to the material for like purposes originally used in the construction of said cars, and at the termination of this contract or the renewed contract, if renewed, return said cars to the party of the first part, in proper condition and repair for the immediate and active use thereof.

"It being understood and agreed between the parties to this contract, that said second party may and hereby reserves the privilege of purchasing said cars at any time during the existence of this contract or the renewal thereof, if renewed, by paying or securing to be paid to said first party to its satisfaction, the original cost thereof.

"It is understood and agreed between the parties hereto, that to preserve the evidence of the ownership of said cars in the said first party, they shall be severally marked or lettered as follows, viz, **W**, which shall

be in addition to any marking or lettering of said cars said second party may make for its convenience.

"In case the said second party shall fail at any time during the existence of this contract or the renewed contract, if renewed, to promptly pay the interest or the principal of any of its bonds or other liabilities, when the same shall respectively have become due, the said first party may, if it so elect, terminate this contract immediately after such default, by written notice of the president of said first party to the president or secretary of said second party, personally served on said president or secretary, or sent to either of them by the United States mail, and the said second party agrees, on the service of said written notice as aforesaid, to deliver forthwith to said first party the actual possession as the owner thereof, of each and all of said 90 (ninety) cars and those with which said second party shall have replaced the same, each and all of which cars shall on such delivery be in proper condition and repair for the immediate and active use thereof.

"THE WESTERN CAR COMPANY,

"By B. E. SMITH, *Pres't.*

"Attest:

"E. C. SMITH, *Sec'y.*

"THE DAVENPORT & ST. PAUL R. R. CO.,

"By GEO. H. FRENCH, *Pres't.*

"Attest:

"J. S. CONNER, *Sec'y.*

"(Endorsed): Copy of contract between the D. & St. P. R. R. Co. and the W. Car Co."

It is admitted that the contract between the Davenport & St. Paul Railroad Company and the Western Car Company Association, entered into in February, 1872, was the same in substance as the contract of October 1, 1873, above set forth in full.

(See record, p. 23).

In December, 1874, one Loomis, claiming to be the owner of certain bonds secured by a mortgage executed by the Davenport & St. Paul R. R. Co., on July 1, 1871, brought suit to foreclose said mortgage, and procured the appointment of a Receiver.

Early in February, 1875, the Western Car Company, by Frederick Lovejoy, its then President, made demand upon the Receiver for the payment of rent for the use of the ninety cars, or for possession of the cars. The Receiver, in answer to the demand, requested the Western Car Company not to take the cars from his possession, as he desired to continue to rent them for use on the railway, and stated that he would have the rent paid as soon as possible; that he had no doubt the court would order the rent paid.

(See record, pp. 38, 39).

In March, 1875, the Western Car Company obtained possession of fifty-six of said ninety cars, under and by virtue of a writ of replevin issued out of the Circuit Court of the United States, for the Northern District of Illinois, at the suit of the Western Car Company against the Chicago & Northwestern Railway Company.

(See record, p. 43).

In May, A. D. 1875, appellant Meyer filed, in the Loomis suit then pending, his cross-bill for foreclosure of the mortgage, making his co-trustee, Dennison, defendant, and also making the Western Car Company defendant. (See record, p. 1).

In this bill it is prayed that "said ninety cars may be adjudged to be the property of said Davenport & St. Paul R. R. Co., and sold as a part of the property included in said mortgage." (See record, p. 8). Although it is admitted in the bill that the ninety cars were *leased* from the Western Car Company.

(See record, p. 6).

To this bill, the Western Car Company answered, denying any contract whatever with the Davenport Railway Construction Company; setting out its contract with the Davenport & St. Paul R. R. Co., leasing to said company the ninety cars; denying that said cars are in any manner subject to the lien of any mortgage executed by the Davenport & St. Paul R. R. Co., and asking that rent for said cars might be paid under the order and direction of the court.

(See record, pp. 8 and 10).

Afterwards Loomis, the original complainant, and Meyer and Dennison, as trustees, filed an amendment to the cross-bill of Meyer, in which they charge that the Western Car Company made a contract with the Davenport & St. Paul Railway Construction Company, on October 1, 1873, whereby a prior sale of the ninety cars was converted into a lease, and that the lease of October 1, 1873, was never recorded.

(See record, p. 13).

To this amendment, the Western Car Company answered, denying any contract whatever with the Construction Company; denying any contract of *sale* with either the Railway Company or the Construction Company, and denying any law requiring a lease of cars to be recorded. (See record, pp. 14, 16).

In March, 1876, the Western Car Company filed its petition and cross-bill asking payment of rent due for the use of said cars and for possession of the 34 cars still in use by the Receiver.

To this petition, Meyer alone answered, setting up substantially the same claim as that averred in his cross-bill. (See record, pp. 19 to 23).

The evidence upon which the case was heard and determined, consists of

1. An agreed statement of facts. (Record, p. 23).

2. Deposition of J. S. Conner. (Record, p. 26).

3. Deposition of Frederick Lovejoy. (Record, p. 37).

4. Deposition of Benjamin E. Smith. (Record, p. 40).

This evidence clearly and conclusively establishes the following facts:

1. That the Western Car Company Association, as a co-partnership, never made any contract with the Davenport & St. Paul R. R. Co., by the terms of which it *conditionally sold* the ninety cars to said company.

2. That the Western Car Company, as a corporation, never made any contract with the Davenport & St. Paul R R. Co., by the terms of which it *conditionally sold* the ninety cars to said company.

It is admitted that both of these contracts, viz, the contract of February, 1872, between the Western Car Company Association and the Davenport & St. Paul R. R. Co. and the contract of October 1, 1873, between the Western Car Company and said Davenport & St. Paul R. R. Co., were substantially the same. (See agreed statement of facts, record, p. 23). The contract of October 1, 1873, is set forth in full in the foregoing pages of this brief, as it appears on pages 29, 33 and 35 of the record.

There is nothing in this contract that can by any possibility be construed into a *conditional sale* of these ninety cars. It is simply a lease of the cars for a fixed period, at a fixed monthly rental.

The clause in the lease, giving to the lessee the privilege of purchasing the cars at any time during the continuance of the lease, by paying for them the full amount they originally cost, does not make the contract a *conditional sale.*

An option to purchase at some future time at a fixed price, has never before been supposed to amount to a *conditional sale.* On the contrary, it negatives the idea of a *present sale*, conditional or unconditional. It is simply an *offer to sell* at a given price, never amounting to a sale until accepted by the party to whom the offer is made or reserved. There is no evidence tending

to show that the Davenport & St. Paul R. R Co. ever at any time accepted the offer reserved to it in the lease to buy the cars at their original cost.

It could only *become the purchaser* of the cars "by paying or securing to be paid to said first party, to its satisfaction, the original cost thereof." There is no pretence that this was ever done.

3. That neither the Western Car Company Association, nor the Western Car Company, ever made any contract whatever relating to the use or possession of these ninety cars, with the Davenport Railway Construction Company, and that said Construction Company never had any ownership in, or title to, said ninety cars, or any of them.

The contract of October 1, 1873, leasing the cars to the Davenport & St. Paul R. R. Co. and the depositions of Benjamin E. Smith and Frederick Lovejoy, establish this fact.

4. That at the time the lease of October 1, 1873, was executed, leasing the ninety cars to the Davenport & St. Paul R. R. Co., Benjamin E. Smith was President of the Western Car Company and a stock-holder in the Davenport & St. Paul R. R. Co., *but was not a director or officer of said Railroad Company.* George H. French was President of the Davenport & St. Paul R. R. Co., *but was in no manner connected with or interested in the Western Car Company.*

The agreed statement of facts (record, p. 24), and deposition of J. S. Conner (record, p. 27), establish this fact.

The fact that Benjamin E. Smith held some of the stock of the Davenport & St. Paul R. R. Co., did not prevent the Western Car Company, of which he was President, from leasing some of its cars to that railroad company, nor did that fact render the lease fraudulent and void. Smith was not a *director* of the railroad company, nor was he an officer of said company, but simply a stock holder.

The owning of stock in an incorporated company, does not create such a trust relation as to prohibit the stock-holder from entering into a valid contract with the corporation in which he is a stock-holder.

The question therefore does not arise in this case, but if it did, it would not be difficult to cite abundant authority in support of the proposition that even a director, or an officer, of a corporation, may enter into a valid contract with the company of which he is a director or officer, and that his trust relation does not render the contract fraudulent and void, but only subjects it to more than ordinary scrutiny, and requires clear proof of fairness and justness in all of its provisions.

5. That the Davenport & St. Paul Railroad Company and the Davenport Railway Construction Company, *were two entirely distinct and separate corporations.*

This fact is established by the

Agreed statement of facts. (Record, p. 24).
Deposition of B. E. Smith. (Record, p. 41).
Deposition of J. S. Conner. (Record, p. 27).

It has already been shown from the evidence, that the Davenport Railway Construction Company *never made any contract whatever with the Western Car Company.* The fact, therefore, that Smith, President of the Western Car Company, and French, President of the Davenport & St. Paul Railroad Company, were both interested in and officers of the Davenport Railway Construction Company, does not at all prove, or tend to prove, any fraud in a contract of lease made by and between the Western Car Company and the Davenport & St. Paul Railroad Company.

6. The fact that, on February twenty-ninth, 1872, *after* the Davenport & St. Paul Railroad Company had leased these cars from the Western Car Company Association, an agreement was entered into between the Davenport & St. Paul Railroad Company and the Davenport Railway Construction Company, by the terms of which the Construction Company agreed "to furnish such rolling stock as shall be necessary for *local traffic.* The same to be subject to the first mortgage bonds, and to hold the cost and interest on same as a claim against the Davenport & St. Paul Railroad Company for future payment" (see record, p. 31), does not prove, or tend to prove, that the cars of the Western Car Company—first leased to the Railroad Company by the Western Car Company Association, in February, 1872, and again leased to said Railroad Company on October 1, 1873, by the Western Car Company, after it became a corporation—ever became subject to the lien of the mortgage executed by the Davenport &

St. Paul Railroad Company. There is nothing in the record anywhere tending to prove that the Construction Company failed to comply with this supplemental contract. The evidence does not show that the Construction Company did not furnish all rolling stock necessary for "*local traffic.*" In the absence of proof to the contrary, it is fair to presume that the Construction Company faithfully complied with its contract in this respect.

It is certain, from the evidence, that these ninety cars *were not leased for use in "local traffic,"* and that their actual use was *not in the "local traffic."*

The contract of lease contains these words: "It is understood and agreed by the parties hereto, that the said 90 (ninety) cars *are to be used by said party of the second part, in its regular business of transportation over its own and other railroads.*" (Record, p. 35).

It is admitted, by the agreed statement of facts, that these cars leased from the Western Car Company, were all constantly used in what is termed "through traffic," or "foreign traffic" (record p. 23), hence it can not by any possibility be reasonably claimed that the Western Car Company cars fell under the supplemental contract between the Construction Company and the Railroad Company, or that the title and ownership of the Western Car Company in these cars was in any manner affected by that contract.

7. It is shown by the agreed statement of facts, and by the decree of the court, that the recovery of rent decreed in favor of the Western Car Company *is*

not based upon the contract of lease, nor in any manner measured by its terms, but is based wholly upon a stipulation and agreement made in open court by all the parties, fixing the *actual value of the use of the cars while used by the Receiver of the court.* (See record, p. 43). It is simply the court decreeing payment for actual benefit received by its officer from the use of the cars of the Western Car Company.

It is difficult, therefore, to perceive just what the good, or bad, faith of the contract of lease has to do with the recovery.

It is certain that these thirty-two cars do not belong to the Davenport & St. Paul Railroad Company, for that company never purchased them, or paid for them.

It is certain that they did not belong to the court or its Receiver.

It is equally certain that the court, by its Receiver, used these thirty-two cars for twenty-six months, and that their use was worth the amount the court decreed in favor of the Western Car Company.

No reason can be justly urged against the payment of this Receiver's indebtedness. Appellants admit that it ought to be paid, if the cars belong to the Western Car Company. (Record, p. 24).

Upon these facts the court rendered the following decree: (Record, pp. 42 to 44).

"And now, May 26, 1877, being at the May term of the said court, this cause came on for hearing on the bills, amendments, answers, replications and cross-bill,

answer, and replication, agreed state of facts, depositions and records in the cause, so far as the same relates to the cars claimed by the Western Car Company.

"And the said complainants in said amended and substituted bill, appearing by James Grant, their solicitor, and the defendant, the Western Car Company, appearing by R. G. Ingersoll and J. D. Campbell, its solicitors, and the court having heard the allegations, stipulations, and proofs of the said parties, and being now fully advised in the premises, it is found by the said court, and ordered, adjudged and decreed, that the allegations contained in the said answer of the said The Western Car Company are true and sufficient; that the said ninety (90) cars mentioned and described in the said complainants' amended and substituted bill, and leased by the said The Davenport & St. Paul Railroad Company from the said The Western Car Company, at all times were and now are the property of the said Western Car Company, and that the said Western Car Company is entitled to the immediate possession thereof.

"And it is thereupon further ordered, adjudged and decreed, that the said complainants' amended and substituted bill of complaint, be, and the same is hereby dismissed as against the said Western Car Company, and that the said Western Car Company, do recover of and against the said last mentioned complainants, its costs expended in this behalf, taxed at

"It is further found by the court, that of the said ninety cars mentioned in said amended and substituted bill, and in the said lease, fifty-six cars have heretofore

come into the possession of the said The Western Car Company, under and by virtue of a writ of replevin, lately issued out of the Circuit Court of the United States, for the Northern District of Illinois, at the suit of the said The Western Car Company against the Chicago & Northwestern Railway Company, and that thirty-four of said cars are now, and have been since the commencement of this suit, in the hands and possession of the Receiver appointed by this court, but that two of the said last mentioned thirty-four cars, to-wit, box car number 187 and stock car number 308, are found to be subject to the lien of the deed of trust under which the complainants claim; and thereupon it is further ordered, adjudged and decreed, that the said Receiver do immediately surrender and deliver up unto the said The Western Car Company, the remaining thirty-two cars, numbered respectively, as follows:

"Box cars 122, 125, 127, 128, 131, 133, 138, 140, 145, 148, 149, 151, 153, 157, 160, 163, 166, 170, 171, 173, 174, 176, 177, 183, 184, 186, 192, 194, 195, 198, and stock cars, 306, 309.

"As to cars No. 139, 144 and 156, the complainants' bill is dismissed without prejudice.

"It having been stipulated and agreed in open court, by the said parties and their solicitors, that the value of the use of the said thirty-two cars, since and while they have been in the hands and possession of and in use by the said Receiver of this court, is the sum of ten dollars per car for each month, since the month of March, A. D. 1875, a period of twenty-six months, and thereupon it is further ordered, adjudged and decreed that the said

The Western Car Company do have and recover, for the use of the said cars, the sum of eight thousand three hundred and twenty ($8,320) dollars, and the said Receiver is hereby ordered and directed to pay over the said moneys to the said The Western Car Company.

"And the said complainants, protesting and objecting to the said findings, and the said decree, now here pray an appeal therefrom to the Supreme Court of the United States, it is considered by the court and ordered that an appeal be and the same is hereby allowed, and that upon perfecting their said appeal and filing a bond herein, with good and sufficient sureties, to be approved by one of the judges of this court, for the use of the said The Western Car Company, in the sum of fifteen thousand dollars, the execution of this decree do stand suspended and superseded, pending the said appeal.

"Signed,

"JOHN F. DILLON,

"*Judge.*"

II.

These ninety cars never became subject to the lien of the mortgage executed by the Davenport & St. Paul Railroad Company to secure the payment of bonds issued by said Company,

1. Because the contract by which the Western Car Company leased said cars to the Davenport & St. Paul Railroad Company *is not a contract of conditional sale.* The transfer of title or ownership of the cars is

not made to depend upon any condition in the lease. It is simply a lease containing an offer to sell at any time during the lease.

The transfer of title does not depend upon the lease and has no connection whatever with it. The same offer to sell might have been made if the cars had then been leased to, and in possession of, some other railway company. An *offer to sell* personal property at a fixed price at any time between given dates is not a *sale* of the property, conditional or unconditional. The title to the property is not affected by the offer, and never can be, until the offer ripens into a contract of sale *by acceptance of the offer* by the person to whom it is held out.

"Assent must, in order to constitute a valid contract, be *mutual, and intended to bind both sides.* It must also *co-exist at the same moment of time.* A mere *proposal* by one man obviously constitutes no bargain of itself. It must be *accepted* by another."

Benjamin on Sales, 1st Am. Ed., sec. 39, and note c.

"A mere proposal or offer, which is not unequivocally accepted, constitutes no bargain."

Story on Sales, sec. 125.

"An agreement to sell is a different thing from a sale, and therefore no mere promise to sell hereafter, amounts to a present sale."

1 *Parsons on Contracts*, 5th Ed., 528.

"Where there is a written offer to sell, an acceptance consummates the agreement, if the offer is still standing. And it is presumed to be so until the time fixed, or, if none were appointed, till it is expressly revoked

or countervailed by a contrary presumption. If the other party agrees to decide whether he will accept the offer, upon the happening of a certain event, no bargain arises till such decision, though the event have happened. There is a binding agreement, when the minds of two persons meet, as signified by acts, although both do not know of such concurrence at the time. A bargain is closed when nothing mutual remains to be done, to give either party a right to have it effected. Until both parties are agreed, either may withdraw an offer which he has made."

Hilliard on Sales, 3d Ed., p. 18.

The monthly rent reserved to the Western Car Company for the use of these cars by the lease, had no connection with, or dependence upon, the offer to sell the cars to the railroad company. Rent paid was not to be applied as so much purchase money, if the railroad company accepted the offer to sell. If the offer to sell was accepted by the railroad company, it was, at the time of acceptance, to pay, or secure, to the Western Car Company the full original cost of the cars, without regard to any rent that it might have paid for the use of the cars under the lease, prior to the acceptance of the offer.

The case is, therefore, quite different from the cases of *Singer Sewing Machine Co.* v. *Holcomb*, 40 Iowa, 33, and *Pittsburg Locomotive and Car Works* v. *State National Bank*, 2 Cen. L. Jour., 692, cited by counsel for appellants.

Those cases were plainly *sales*, disguised under the form of leases, in which the money nominally paid as rent, was really paid, and received, as purchase money. The decision of Judge Dillon in the case last above

cited, is not at all in conflict with the decree rendered by him in this case. There is no similarity between the two cases. The face of the contract in that case showed, beyond question, that it was, and was intended by the parties to be, a conditional sale While in the case at bar the contract clearly shows that there was *not*, and could not be under its terms, any conditional sale. It contains an *offer to sell*, thereby conclusively negativing the idea of a *present sale* either with, or without, condition.

It seems clear, therefore, that these cars did not become subject to the lien of the mortgages executed by the Davenport & St. Paul Railroad Company, because the contract under which the Railroad Company held possession of the cars at the time of the appointment of the Receiver, *is not a contract of conditional sale.*

2. But even if this contract were a conditional sale, instead of a simple lease, the lien of the mortgages executed by the Davenport & St. Paul Railroad Company, would not attach to these cars.

Upon this subject, the following propositions are settled, and can not longer be regarded as subject to doubt:

1. A contract of conditional sale is a legal and valid contract *between the parties thereto and their privies*, regardless of compliance with any state recording act.

2. The possession taken by the Receiver is only that of the court, whose officer he is, *and adds nothing to the previously existing title of the mortgagees.*

His appointment does not change the *contract relations* existing between the corporation, and those with whom it has contracted. *Nor does it change the title or create any lien upon the property.*

3. The mortgagees take just such an interest in the property as the *mortgagor had acquired prior to the appointment of the Receiver;* no more, no less. They are in no sense *purchasers* of cars found in possession of the company at the time the Receiver is appointed, but not owned by the company. Nor does the appointment of the Receiver place the mortgagees in the position of "third parties," or "attaching creditors." The lien of the mortgage only attaches to "after acquired" property *subject to all the conditions with which it is incumbered when it comes into the hands of the mortgagor.*

Fosdick v. *Schall*, 99 U. S. Rep., 235.

The statute of Iowa upon the subject of conditional sales, is not essentially different from that of Illinois, under which the case of *Fosdick* v. *Schall* was decided.

IOWA STATUTE.

"AN ACT requiring conditional sales of personal "property to be executed, acknowledged and recorded, "like mortgages of personal property, to be of any "validity as against *bona fide* purchasers, execution and "attaching creditors.

"SECTION 1. Be it enacted by the General Assem- "bly of the state of Iowa, that no sale, contract or lease, "wherein the transfer of title or ownership of personal "property is made to depend upon any condition, shall "be valid against any creditor or purchaser of the ven- "dee or lessee, in actual possession obtained in pursu-

"ance thereof, without notice, unless the same be in "writing, executed by the vendor or lessee, and recorded "the same as a chattel mortgage."

Acts 14th General Assembly, p. 69.

ILLINOIS STATUTE.

"That no mortgage, trust deed, or other convey- "ance of personal property, having the effect of a mort- "gage or lien upon such property, shall be valid as "against the rights and interests of any third person, "unless possession thereof shall be delivered to, and "remain with the grantee, or the instrument shall pro- "vide for the possession of the property to remain with "the grantor, and the instrument is acknowledged and "recorded as hereinafter directed; and every such "instrument shall, for the purposes of this act, be "deemed a chattel mortgage."

Rev. Stat. of Ill., 1874, p. 711.

If, therefore, the court should hold that the contract of October 1, 1873, is a contract of conditional sale, instead of a lease, still the title to the cars remains in the Western Car Company, and Judge Dillon was right in decreeing "that the said ninety cars, mentioned and described in the said complainants' amended and substituted bill, and leased by the said The Davenport & St. Paul Railroad Company from the said The Western Car Company, at all times were and now are the property of the said Western Car Company, and that the said Western Car Company is entitled to the immediate possession thereof."

There is no pretense that the railroad company ever paid for these cars. The only claim of ownership asserted by the mortgagees is based upon the ground that these cars became subject to the lien of the mort-

gage by delivery to the railroad company under the contract of lease.

It has been shown that this claim can not be maintained,

1. Because the contract is not a contract of conditional sale, but simply a lease.

2. Because if it were a contract of conditional sale, the lien of the mortgage would not attach to the cars until the conditions of the purchase were performed.

III.

The contract by which the Western Car Company leased these ninety cars to the Davenport & St. Paul Railroad Company is not fraudulent.

There is not a word of evidence in the record tending to prove *actual* fraud. In fact appellants do not claim that any actual fraud existed. Their claim is, that the *trust relations* of the contracting parties rendered the contract fraudulent *in law*. This position is untenable under the law and the facts.

B. E. Smith was President of the Western Car Company. As an individual he held some of the stock of the Davenport & St. Paul Railroad Company. He was not an officer, or director, of the railroad company. G. H. French was the President of the railroad company. He was in no manner connected with, or interested in, the Western Car Company. The Western Car Company, as a corporation, held no stock of the rail-

road company, and was in no manner interested in it The Davenport & St. Paul Railroad Company, as a corporation, held no stock of the Western Car Company, and was in no manner interested in it, or its welfare. Both B. E. Smith and G. H. French were officers of the Davenport Railway Construction Company, and this Construction Company was a stock-holder in the Davenport & St. Paul Railroad Company. But the Western Car Company never made any contract whatever with this Construction Company. Nor had the Construction Company any stock in, or connection with, the Western Car Company.

The fact that Smith and French were officers of the Construction Company, could not render fraudulent a contract entered into between two other distinct and separate corporations of which they were the Presidents. Especially is this true when it is considered, that the Western Car Company, as a corporation, held no stock, or interest of any kind, in either the Railroad Company or the Construction Company.

It appears, therefore, that the *only* relation existing between the Western Car Company, and the Davenport & St. Paul Railroad Company, at the time this lease was executed was this, viz: B. E. Smith, President of the Western Car Company, was a *stock-holder* in the Railroad Company.

It certainly can not be seriously claimed that this created such a *trust relation* as to render the lease fraudulent and void. No authority worthy of consideration, can be produced in support of such a proposition.

Even if B. E. Smith had been a *director* of the Davenport & St. Paul Railroad Company, that fact would not have rendered this lease fraudulent in law.

Hotel Co. v. *Wade*, 97 U. S. Rep., 22.
Twin Lick Oil Co. v. *Marbury*, 91 U. S. Rep., 587.
Harrison v. *Harrison*, 2 Atk., 120.
Green v. *Winter*, 1 Johns Ch , 38.
The Am. Cent. R. W. Co. v. *Miles*, 52 Ill., 174.
Merrick v. *Peru Coal Co.*, 61 Ill., 472.
Rockford, R. I. & St. Louis R. R. Co. v. *Sage*, 65 Ill., 328.
Hart, et al., v. *Brown, et al.*, 77 Ill., 226.
The Episcopal Charitable Society v. *The Episcopal Church in Dedham*, 1 Pick., 371.
Moss v. *The Rossie Lead Mining Co.*, 5 Hill, 137.
Stark & Wales v. *Coffin*, 105 Mass., 328.
Credit Association v. *Coleman*, Law Rep., 5 Ch., 568.
Troup's Case, 29 Beav., 353.
Hoare's Case, 30 Beav., 225.
Smith v. *Lansing*, 22 N. Y., 520.
Busby v. *Finn.*, 1 Ohio St., 409.

But it is claimed that the supplemental contract between the Construction Company and the Railroad Company (record, p. 31), tends in some way to render this lease fraudulent; just how it can possibly have any such bearing is not disclosed. That was a contract by which the Construction Company agreed with the

Railroad Company, to furnish such rolling stock as shall be necessary for "*local traffic*," and that the rolling stock so furnished by the Construction Company should be subject to the mortgage of the Railroad Company, and the Construction Company would look to the Railroad Company for payment for the rolling stock so furnished.

How this contract can affect a lease of cars by the Western Car Company to the Railroad Company, and render it fraudulent, is beyond comprehension.

The Western Car Company is not a party to that contract, and can not be in any way bound by its terms. If the Construction Company utterly failed to comply with that contract, its failure could not make the cars of the Western Car Company subject to the lien of the mortgage of the Railroad Company The absurdity of the proposition is its refutation. But there is no proof, or even intimation, in the record, that the Construction Company did fail to comply with its contract. The contract called for "rolling stock"—locomotives and cars of various kinds—such as might be necessary for the "*local traffic*" of the railroad. There being no proof in the record to the contrary, it is fair to presume that the Construction Company faithfully performed its obligations. Whether it did or did not, can not affect the contract between the Western Car Company and the Railroad Company, or deprive the Car Company of its ownership of cars leased by it to the Railroad Company.

The lease of these cars, upon its face, and the facts disclosed in the agreed statement of facts and in the decree, prove conclusively that the Western Car Company cars were not leased for use in "*local traffic*," but

for "through freight," or what is called "foreign traffic," and that they were actually so used.

Even if the lease of October 1, 1873, entered into between the Western Car Company and the Davenport & St. Paul Railroad Company, could be held fraudulent and void on account of the relations existing between the contracting parties, *still, that would not divest the Western Car Company of its ownership of the cars*, nor would it forfeit them to the Railroad Company and thereby make them subject to the lien of the mortgage.

IV.

The money recovery decreed by the court in favor of the Western Car Company, is not based upon or measured by the terms of the lease. It is the amount stipulated and agreed by all the parties to the litigation to be justly due for the *actual use of the cars by the Receiver of the Court.* It is further agreed by all the parties, that the use of the thirty-two cars *was worth to the trust* in the hands of the court, the eight thousand three hundred and twenty dollars ($8,320), decreed by the court in favor of the Car Company.

(Decree, record, p. 43).

It is admitted by the appellants, that this rent ought to be paid if the cars are held to be the property of the Western Car Company. (Record, p. 24).

There can be no just reason urged against its payment. *It is the debt of the court*, contracted in the pre-

servation and management of the property and business interests of the Railroad Company, under a trust assumed by the court at the instance and request of these mortgagees. That such debts should be paid, there can be no question.

Fosdick v. *Schall*, 99 U. S. Rep., 235.

V.

By the decree in this case it was decreed:

1. That the Receiver immediately surrender and deliver to the Western Car Company, the thirty-two (32) cars remaining in the Receiver's possession.

2. That the Receiver pay over to the Western Car Company eight thousand three hundred and twenty dollars ($8,320) for the use of said thirty-two cars, by the Receiver, for twenty-six months next preceding the date of the decree.

The decree was rendered on May 26, 1877, nearly three years since. These mortgagees appealed to this court and superseded the decree by giving a bond in the sum of fifteen thousand dollars. The condition of the bond is that, if they fail to make their plea good, they "shall answer all *damages* and costs which may be thereupon adjudged against them." By the appeal they have retained in their possession, and in use for the benefit of the railroad, these thirty-two cars, the property of the Western Car Company, for nearly three years; which is about one-fourth part of the average life, or serviceable existence, of ordinary freight cars.

Justice requires that the Western Car Company shall be paid for this detention and use of its cars, and it ought not to be remitted to new and tedious litigation to obtain its just dues for such detention and use. The *damages* sustained by the Western Car Company by this detention and use of its cars, is their fair rental value during the detention. The parties themselves stipulated and agreed in open court, that the value of their use was ten dollars per car, for each month, from March, 1875, to May 26, 1877, the date of the decree. Their rent since the date of the decree has certainly been as valuable as it was prior to the decree; for it is well known history that railroad business has, with the return of general prosperity, largely and steadily increased in volume and value, during the pendency of this appeal. It certainly could not be unfair or inequitable to measure the *damages* for the detention under the appeal, by the *agreement* of the *appellants* as to the monthly rental value of the cars, *at the time the appeal was taken.* This agreement is the only fact in the record that would enable this court to adjudge damages for detention of the cars pending the appeal.

Interest upon the decree for eight thousand three hundred and twenty dollars, from May 26, 1877, to April 26, 1880, thirty-five months, would make that part of the decree now amount to the sum of $9,776.00.

If damages for detention of the thirty-two cars for the same period should be adjudged at the rate of ten dollars per month, per car, such damages for the thirty-five months during which this appeal has been pending,

would amount to the sum of $11,200.00, making the total money damages justly due to the Western Car Company $20,960.00.

Why the Circuit Court should have granted a supersedeas upon a bond of only fifteen thousand dollars is very strange; it certainly falls far short of adequate protection of the rights of the Western Car Company. The value of the thirty-two cars detained by this appeal, from their owner for about three years, was certainly not less than twenty thousand dollars. The rent of these thirty-two cars pending the appeal, would certainly have been worth to the Western Car Company all of eleven thousand two hundred dollars. The money decree superseded by the appeal, now amounts to nine thousand seven hundred and seventy-six dollars, and yet the only security or protection furnished for all this property, money and damages, is a bond of fifteen thousand dollars.

Under section 701, U. S. Revised Statutes, and cases decided under that section, it would seem that this court may direct such decree to be entered, as the justice of the case may require. If the facts in the record are held insufficient to enable the court to adjudge the damages, direction might be given to the Circuit Court to issue a writ of inquiry for the assessment of damages.

We ask that the decree of the Circuit Court may be in all things affirmed, and that, in addition to the affirmance of said decree of the Circuit Court, such further decree may be rendered by this court, or that such order may be directed to the Circuit Court, as will

insure to the Western Car Company just and speedy payment of the damages it has sustained by being deprived of the possession and use of its property, pending this appeal.

Respectfully submitted,

McDONALD & BUTLER,

Solicitors for Appellee,

By JOHN M. BUTLER.

INDIANAPOLIS, IND., APRIL 1, 1880.

OFFICE SUPREME COURT U. S.
FILED
APR 7 1880
D. W. MIDDLETON, Clerk.

IN THE

Supreme Court of the United States.

No. 262.—October Term, 1879.

LEWIS H. MEYER ET AL., APPELLANTS,

vs.

THE WESTERN CAR COMPANY, APPELLEE.

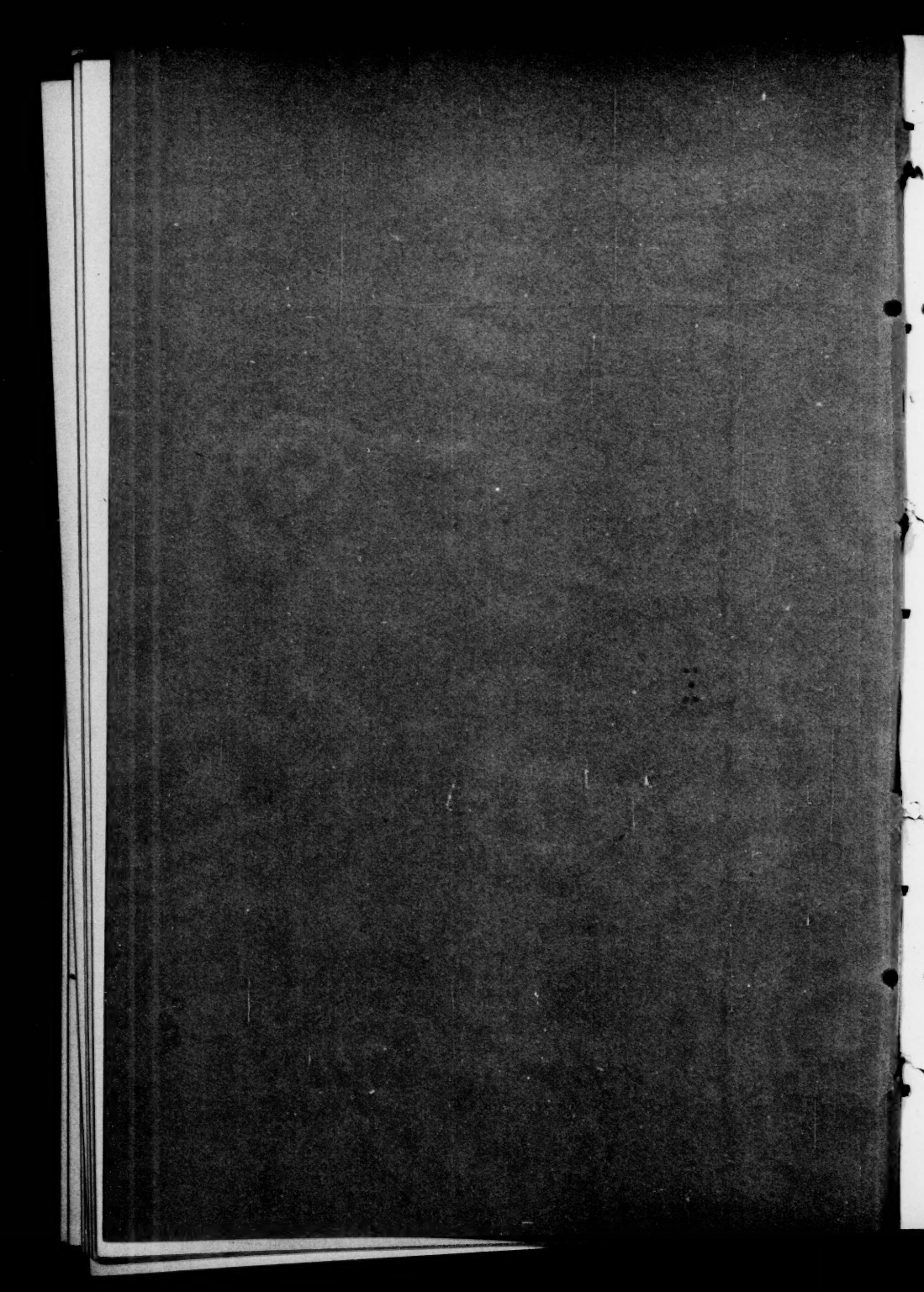
Appeal from the Circuit Court of the United States for the District of Iowa.

ARGUMENT FOR APPELLEE.

R. G. INGERSOLL,

Counsel for Appellee.

J. L. Pearson, Printer, 9th and D sts., Washington.



IN THE

Supreme Court of the United States.

No. 262.—October Term, 1879.

Lewis H. Meyer et al., Appellants, *vs.* The Western Car Company, Appellee.	Appeal from the Circuit Court of the United States for the District of Iowa.

Argument for Appellee.

STATEMENT OF THE CASE.

The allegations of the original bill, so far as they refer to the appellee, are as follows:

1. That the Railway Construction Company and the Davenport and St. Paul Railroad Company leased ninety cars of said Western Car Company at a rental of twenty dollars per car per month, and have paid out of the income of said railroad the sum of twenty-four thousand dollars; that said lease was a fraud upon the creditors of the Davenport and St. Paul Railroad Company, and said Construction Company is bound to pay for the cost price of said cars and to refund and pay to the plaintiff, as trustee, all the money paid for the use thereof.

2. That said ninety cars may be adjudged to be the property of said Davenport and St. Paul Railroad Company, and sold as a part of the property included in said mortgage.

The answer denies that the lease of cars was made to the Construction Company, but admits it was made to the Davenport and St. Paul Railroad Company; and alleges that $15,000 was due for rent prior to the appointment of a receiver, and that $12,000 rental has accrued since the appointment of a receiver in that case.

The amended bill of November 13, 1875, avers that a prior sale of these cars was changed to a lease, and that the cars became subject to the lien of the mortgage; that the contract of October 1, 1873, was never recorded, as required by the laws of Iowa.

The answer of the Western Car Company denies the allegations of the amended bill, and avers that the recital of change of ownership in the lease of October 1, 1873, related to the transfer of said cars from the Western Car Company association to the Western Car Company; that the laws of Iowa did not require the lease to be recorded, and did not affect the title of the Western Car Company to its cars; that the mortgage upon the railroad was not a lien upon the said cars.

The amended answer of March 18, 1876, denied the sale of said cars, and the lien of the mortgage thereon, and avers that but thirty-four or thirty-six of said cars ever came into the possession of the receiver; admits the lease was not recorded, but denies it was required by law to be recorded.

March 18, 1876, the Western Car Company filed its cross-bill, averring:

1. A lease, October 1, 1873, of ninety cars to the Davenport and St. Paul Railroad Company.

2. Delivery of possession to said company and its use of said cars until the appointment of a receiver, and retaking possession of fifty-six cars March 10, 1874; that the rental then due was $15,000.

3. That the receiver of said railroad company has used thirty-four cars since his appointment, and paid no rental.

4. That the unpaid rental should be deemed a part of the operating expenses of the road, and be entitled to priority over any claims or liens of the bondholders.

5. That the back rental be paid and the cars turned over to the possession of complainant.

Meyer, trustee for the bondholders, filed an answer denying the allegations of the cross-bill.

The original bill and answer and replication made up the following issues:

1. That the lease in question was a fraud upon the creditors of the Davenport and St. Paul R. R. Company.

2. That the cars were the property of the said railroad company, and covered by the mortgage to *Meyer et al.*

The issues of the amended bill and pleadings are:

1. That the cars were sold prior to Oct. 21, 1872, to the Davenport and St. Paul Railway Construction Company, and the possession had been transferred to the Davenport and St. Paul Railway Company prior to that time; and that the contract of October 21, 1873, attempted to change the sale into a lease.

2. That the cars, on delivery to the Construction Company, became subject to the lien of the mortgage as after-acquired property of the railway company.

3. That the contract of October, 1873, was never recorded, and is invalid against the plaintiffs as creditors of the railway company.

The issues, so far as the character of the contract of October 1, 1873, is concerned, and the priority of the mortgage lien, were made up under the original bill and not under the cross-bill.

The issues of the cross-bill were that—

1. Ownership of the cars in question and lease of them to the Davenport and St. Paul R. R. Co.

2. The receiver took possession of 34 cars when he took possession of the railway, and now had possession of 34 cars and has used the same.

3. That there was due as rental when he took possession the sum of $15,000, which it was asked the court would order him to pay out of the income of the road.

4. That the receiver owed under the contract the sum of $12,000, which should be ordered paid out of the income in his hands, and that the contract of lease should be enforced against him.

5. That he should deliver to the Western Car Company the possession of the 34 cars.

The answer to the cross-bill denied the ownership and alleged that they were received and possessed by the Davenport and St. Paul Railway Company under a contract of conditional sale made prior to February 15, 1873, and that they were covered by the mortgage.

2. Denied that anything was due for rent.

It was stipulated on the trial "that the case of the Western Car Company, wherein the trustees claim 90 cars under the mortgage and the Car Company claims the same under a contract of 1st October, 1873, may be tried on the following facts, taken into consideration with the evidence on record."

It was agreed in this statement of facts:

1. That the cars were delivered to the Davenport and St. Paul Railroad Company by the Western Car Company association under a conditional contract or lease, similar to that of October 1, 1873.

2. At or prior to October 1, 1873, the Western Car Company corporation was formed, and the Western Car Company received possession of said cars from the Western Car Company association, and claim title and rental of the cars under the contract of October 1, 1873; and the receiver had paid no rental for the cars.

That the cars in controversy were marked "W," as stated in the contract.

3. That 58 of the cars had been replevined from the Chicago and Northwestern Railroad Company by a writ from the United States circuit court at Chicago.

4. That the contract of October 1, 1873, was never recorded.

On the trial in the court below appellant introduced in evidence the deposition of J. Smith Connor, in substance as follows:

1. That the cars in question were delivered to the Davenport and St. Paul Railroad Company, and remained in its possession until December, 1874, when about 56 were garnished in the hands of the Chicago and Northwestern Railroad Company.

2. The Davenport Railway Construction Company operated and received the income of the road from January 1, 1872, until it was taken possession of by the receiver.

Exhibit "A" is the contract of October 1, 1873, between the Western Car Company and the Davenport and St. Paul Railroad Company, hiring the said cars of the Western Car Company, and recognizing the ownership of the cars to be in that corporation.

The appellee introduced in evidence the following:

Deposition of F. Lovejoy, president of Western Car Co.

1. That eighty box cars and ten stock cars of Western Car Company were leased to the Davenport and St. Paul Railroad Company prior to and up to May, 1873, by an association known as the Western Car Company. That, May 6, 1873, the Western Car Company was organized as a corporation under that name, under a charter granted by the State of Delaware. May 14, 1873, the Western Car Co. association transferred its cars and contracts to the Western Car Co. corporation, and the railway company used the cars under the contract then existing, at a rental of $20 per month, until October 1, 1873, when the new contract was entered into.

2. That the ownership of the cars was never in the railroad company, but in the Western Car Company.

3. That there was no secret or open arrangement by which payments of the rental of said cars should be ap-

plied upon the purchase-money, and no money was paid towards the purchase of said cars.

4. After the road passed into the hands of a receiver, the Western Car Company demanded the payment of rental on the cars, and received the reply that the rental would be paid. This was in February, 1875.

5. There was due for rental on February 1, 1875, $6,650, which is still unpaid.

B. E. Smith also testified:

That he sold the bonds; that no statement was made that the cars were subject to the bonds.

That the contracts were made in good faith, and the same as those made with other railroad companies.

The court, in its decree, found that the answer of the Western Car Company was sufficient, that the thirty-two cars were and are the property of the Western Car Company, and it was entitled to their possession; and by agreement of counsel fixed the rental of the thirty-two cars at ten dollars per month per car, for each month since March, 1875, amounting to $8,320.

From this decree an appeal was taken to this court.

Constitution of Iowa.

Art. III., "Sec. 29. Every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

Statutes of Iowa.

Chapter 63, Act of 14th General Assembly, page 69 (sec. 1,922, Code of 1873, p. 356), entitled "An act requiring that conditional sales of personal property be executed, acknowledged, and recorded like mortgages of personal property, to be of any validity as against *bona fide* purchasers, execution and attaching creditors."

Conditional sales; when invalid. C. 63, 14 G. A.

TITLE 13, Chapter 4, "Sec. 1,922. No sale, contract, or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any creditor or purchaser of the vendee, or lessee in actual possession obtained in pursuance thereof, without notice, unless the same be in writing executed by the vendor or lessor, acknowledged and recorded the same as chattel mortgages."—(Code of 1873, p. 356.)

RAILWAY STATUTES.

The railroad statutory provisions are as follows:

"SEC. 1,216. Any such corporation which has or may construct its railway so as to meet or connect with any other railway in an adjoining state at the boundary line of this state, shall have power to make such contracts and agreements with the corporations controlling such railways in an adjoining state for the transportation of freight and passengers, or for the use of its railway by such foreign corporation as the board of directors may see proper."

"SEC. 1,283. Any such corporation shall have power to issue its bonds for the construction and equipment of its railway, * * *; such corporation may also secure the payment of said bonds by executing mortgages or deeds of trust of the whole or any part of its property and franchises.

"SEC. 1,284. Said mortgages or deeds of trust may, by their terms, include and cover, not only the property of the corporation making them at the time of their date, but property, both real and personal, which may thereafter be acquired, and shall be as valid and effectual for that purpose as if the property were in possession at the time of the execution thereof.

"SEC. 1,285. Said mortgages or deeds of trust shall be executed in such manner as the articles of incorporation or by-laws of the corporation may provide, and shall be recorded in the office of the recorder of each county through which the railway of the corporation may run, or in which any property mortgaged or conveyed by such deeds of trust may be situated, and shall be notice to all the world of the rights of all parties under the same, or

for this purpose, and to secure the rights of mortgagees or parties interested under deeds of trust so executed and recorded, *the rolling-stock and personal property of the company properly belonging to the road and appertaining thereto, shall be deemed a part of the road*, and said mortgages and deeds so recorded shall have the same effect, both as to notice and otherwise, as to the personal as to the real estate covered by them."

SEC. 1,292 requires any railway corporation operating a railway to connect with other roads and to "draw over its railway the cars of such other connecting railway."

SEC. 1,300 provides: "Any such corporation may sell or lease its railway property and franchises to, or may make joint running arrangements with any corporation owning or operating any connecting railway: * * *"

"SEC. 1,301. Any contract, lease, or benefit derived therefrom, contemplated in either of the three preceding sections, may be mortgaged for the purpose of securing construction bonds in the same manner as other property of the corporation."

The contracts provided for in sec. 1,298 are for drawbacks between connecting corporations not exceeding fifteen per cent.

Sec. 1,299 permits a company owning or operating a railway to raise capital for an extension by contracting to give to the persons furnishing the capital a drawback of twenty per cent. of the gross earnings of such extension, or to lease of said capitalists the portion or extension built with their capital.

The leases or contracts permitted to be covered by a trust deed were not leases and contracts for the use of freight cars, but leases or contracts solely with reference to capital furnished.

As to after-acquired personal property, especially rolling-stock, the mortgage could only cover that which had been purchased by the railway company. It could not cover leased cars, as by the terms of the railroad law it can only cover the rolling-stock of "the company properly belonging to the road and appertaining thereto." If the

company had acquired such property that fact could be shown by bills of sale or other proofs of purchase.

In this case there was no pretence of a purchase nor of change of title.

The Contract of Lease.

The contract set forth on pages 35 and 36, transcript of record, provides as follows:

1. For hiring ninety cars owned by the Western Car Company to the Davenport and St. Paul Railroad Company for the term of five years, with the privilege of a renewal for another five years upon the same terms and conditions upon the request of either of the parties hereto; written notice of such request being made at any time within the fifth year of the contract.

The Davenport and St. Paul Railroad Company agreed to pay a rental of $20 per month per car for each month of the contract; to replace any cars destroyed by accident; buy new cars lettered, numbered, and marked as the destroyed cars were marked, agreeing that "*each and all of said replacing cars shall become and be the property of said party of the first part the same as were the destroyed or disabled* cars they shall have replaced." Also, to keep the cars in good repair, "and at the termination of this contract, or the renewed contract, if renewed, return said cars to the party of the first part, in proper condition and repair for the immediate and active use thereof."

The railroad company reserved to itself the privilege of purchasing the cars at their original cost at any time during the existence of the contract.

It was also agreed "*that to preserve the evidence of the ownership* of said cars in the said party of the first part, they shall be severally marked or lettered as follows, viz., (W)."

Also, in case of failure of the railroad company at any time during the existence of the contract "to promptly pay the interest on the principal of any of its bonds or other liabilities, when the same shall respectively have become

due," the Western Car Company was authorized on written notice, to terminate the contract, and the railroad company agreed, on the service of such notice, "to deliver forthwith to said first party the actual possession as the owner thereof, of each and all of said 90 (ninety) cars, and those with which said second party shall have replaced the same."

This contract recognized the ownership of the cars as in the Western Car Company, and provided for a forfeiture of the contract and restoration of the cars in case of default in the payment of the interest on the bonded debt.

ARGUMENT.

I.

Questions of Practice.

Counsel of appellants argue the case as though the issues were made upon the cross-bill and answer alone.

The case was heard, as the final decree states, "on the bills, amendments, answers, replications, and cross-bill, answer and replication, agreed state of facts, depositions, and records in the cause, so far as the same relate to the cars claimed by the Western Car Company, * * * * and the court having heard the allegations, stipulations, and proofs of the said parties, and being now fully advised in the premises, it is found by the said court and ordered, adjudged, and decreed, that the allegations contained in the said answer of the said Western Car Company are true and sufficient."—(pp. 42, 43, *Transcript of Record.*)

As the record was made up by appellants, and the decree recites that there was a replication to the answer to the cross-bill, they cannot take advantage of their omission to incorporate it in the record.

The same rule applies to the recital of the decree as to the statement of the clerk in the record as to record

entries. "The record transmitted to this court certified by the clerk of the circuit court, states that the appeal was taken in open court. This is sufficient evidence of that fact."

Hudgins et al. vs. Kemp, assignee, et al., 18 How., 534.

If there was no formal replication, the record shows a sufficient replication to take the case out of the 66th rule. The first clause of the agreed statement of facts is that the case, which included the issues of the original bill, as well as cross-bill, "may be tried on the following facts, taken into consideration with the evidence on record." This stipulation, like that in *Clements vs. Moore*, 6 Wall., 303, treated the issues as fully made up and to be heard on proofs, and was a waiver of a formal replication. This court held, on page 310, in that case: "Hence it is insisted that our examination is to be confined to the original bill and answer, and that we cannot look beyond them. We find in the record a sufficient replication, though it was not filed until after a part of the testimony had been taken. But if there were none, there are two sufficient answers to both of the objections. They were not made in the court below. They were thereby waived and cannot be taken here. They are also within the provisions of the statute of 1789 upon the subject of jeofails." To the same effect is *Fritz vs. Stover*, 22 Wall., 204.

This disposes of the point made by appellants, that this court must receive the answer to the cross-bill to be true, and reject the depositions and agreed statement of facts.

The point made by appellants is not in accordance with equity practice.

In *Gettings vs. Bench's Administratrix*, 9 Cr., 373, it was held that the answer was to be taken as true, because there was neither a replication, nor evidence in the record denying the answer.

The reason of the rule is well stated by the Court of Appeals of Kentucky:

"The want of a replication cannot *per se* be cause for reversing a decree. * * * The rule is clear that when a complainant elects to set the cause down on bill and answer only, on the hearing the answer shall be taken as true in all its parts. But suppose the case is set for hearing on the bill, answer, and depositions of both parties, are the depositions to weigh nothing? In such case it seems that the reason for admitting the answer, to have full credence, has failed; the reason for taking an answer as true, in all its parts, where the complainant has expressly set the cause for hearing on bill and answer only, seems to be that the complainant by thus hastening the cause to trial has taken from the defendant the opportunity of supporting his answer; and when the complainant exercises his right of thus setting the cause for hearing without opening the door for proof, he must admit all the defendant could by the pleadings be permitted to prove. * * * This shows that where a cause has been brought to hearing upon bill, answer, and depositions, the replication is considered as but a matter of form. If such is the English practice, much more ought it to be so in our proceedings in chancery."

Scott vs. Clarkson's Ex'x, 1 Bibb, 279.

To the same effect are—

Jameson vs. Conway, 5 Gilm., 229.
Chambers vs. Rowe, 36 Ill., 173.
Jones vs. Neely, 72 Ill., 451.

It was also held, that where the complainant did not call for an answer under oath, or waived it, and no replication was filed, "the answer is not for any purpose evidence in the cause, but performs the office of pleading merely. It proves nothing which it alleges, and the only purpose which it serves is to assist in making up the issues."

Chambers vs. Rowe, 36 Ill., 173.
Jones vs. Neely, 72 Ill., 451.

The issues of the cross-bill, with the exception of the liability of the receiver to pay rental and to return the cars in his possession, were the same as those made by the original and amended bills and pleadings; and the court held

upon the evidence submitted that appellee was the owner of the cars, and entitled to their possession and payment of rental for the time they were in the hands of the receiver.

II.

The Law of Conditional Sales.

The statute in regard to conditional sales does not apply to the contract in question, and the court below so held. The title of the act, chapter 63, 14th General Assembly of Iowa, (sec. 1,922, Code of 1873,) was as follows:

"An act requiring that conditional sales of personal property be executed, acknowledged, and recorded, like mortgages of personal property, to be of any validity as against *bona fide* purchasers, execution and attaching creditors."

This title governs the tenor of the statute under the 29th section of Article III. of the constitution. "Every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title."

This rule limits the scope of the phrase "any creditor," to any "execution and attaching creditor," and renders void the clause "or lessee in actual possession, obtained in pursuance thereof." It also restricts the act to "conditional sales," and in any event can extend only to contracts or leases which are in fact conditional sales. A lease which provides for the payment of a rental in installments, and that upon the payment of the last installment the title shall vest in the lessee, is a conditional sale in fact, and, as such sale, comes within this act. The price and terms of payment and time when transfer of title shall vest are all fixed; the minds of the parties have fully met on all points. The vendor cannot claim a lien on the property unless he has

the contract of sale executed and acknowledged, like a conveyance of real estate, and filed for record with the recorder of the county where he resides.

The title also limits the act to *bona fide* purchasers. Mortgagees are not purchasers, and are not included in the act. The title also limits the act to "execution and attaching creditors." The mortgagees were not of that class. They had no execution. They had not sued out an attachment in accordance with the attachment laws of the State of Iowa. They were not entitled to have the lease set aside as void. They were mortgage creditors, basing their claim on the assumption that the property became theirs by purchase and was covered by the mortgage in 1872.

An act in its title related only to notes and bills of exchange; a provision in it respecting other written instruments was held void.

Mewherter vs. Price, 11 Ind., 199.

Appellants contend that the lease is within the statute, because it is "conditional," and cite five conditions:

1. Option of renewal.
2. Replacement of destroyed cars.
3. Repair of cars.
4. An option of purchase by lessee at any time during the lease, if satisfactory terms are made.
5. An option of the lessor to annul the contract at any time when the lessee failed to pay interest on its bonds.

None of these conditions come within the law. There was no provision for a sale under the guise of a lease. There was no condition that the title to the cars should be transferred to the railway company at the termination of the lease for five years, and that the monthly rental should be *pro tanto* payments of the purchase price. Such leases are held by the courts to be in fact sales. This is shown by decisions in piano and sewing-machine cases. As in the case of *Lucas vs. Campbell et al.*, 88 Ill., 449, where the

court held: "Considerable ingenuity has been employed to give this sale the form and effect of a mere lease." * * "This form of instrument seems intended as a substitute for a chattel mortgage, and to create a lien on the machine sold without the expense or inconvenience of the execution of a chattel mortgage."

To the same effect are—

Latham vs. Sumner, 89 Ill., 235.
Moseby & Bro. vs. Shattuck, 43 Iowa, 541.

In the case last cited the court held: "The contract establishes a conditional sale." Also that the sale was valid because made prior to the passage of section 1,922 of the Code, "which in substance provides that no conditional sale shall be valid against creditors or purchasers of the vendee unless in writing and recorded."—(Ibid., 544.)

The case of *Pittsburg Locomotive and Car Works vs. State National Bank of Keokuk*, cited by appellants, is governed by the same rule. The facts show a sale, the sum to be paid in nine months, when the title was to pass.

The rule of *ejusdem generis* applies to the words "contracts" and "leases" in this section, under the rule held by this court in *Neal vs. Clark*, 5 Otto, 708, 709.

In accordance with this rule is the decision in *U. S. Rolling-stock Co. vs. Potter*, 48 Iowa, 67, that the real nature of the agreement is to be determined from a consideration of all its parts and not any single expression.

Hence that court has held contracts of agency do not come within section 1,922.

Crooker Bros. et al. vs. Brown, 40 Iowa, 146.
Bayliss vs. Davis, 47 Iowa, 342.
Williams Bros. vs. Davis, 47 Iowa, 365.

It has also held that contracts are divisible into two distinct contracts.

2 *Parsons on Contracts*, p. 517.
McDaniels vs. Whitney, 38 Iowa, 62.
Pitkins & Brooks vs Fulton & Davis, 47 Iowa, 56.

In the case last cited a lease for a store provided for a specific chattel mortgage lien on the goods in the store, and the court held the lease was not void under section 1,922, for two reasons:

"1. This section applies only to personal property. 2. It applies to cases wherein the transfer of title or ownership is made to depend upon a condition."

"II. It is contended by appellants that the lease, in so far as it creates a specific mortgage lien, is void against the creditors of the lessee because not recorded as a chattel mortgage in conformity with the provisions of section 1,923 of the Code. It may be conceded that, in so far as this lease constitutes a mortgage, it is not valid as against the plaintiffs, inasmuch as it was not recorded when the mortgage to plaintiffs was executed."

It was further held that taking a void specific chattel mortgage lien did not divest the landlord of his right to rely upon a landlord's lien.

That case shows that section 1,922 applies only to cases where the intent of the parties is that the title of the property shall pass to the lessee on completion of the payment of the rental—where a sale, not a lease, is intended.

It does not apply to a case where the payment of the rental is not in any sense payment of the purchase price, and when, at the expiration of the lease, the property is to be returned to the lessor.

Again, under the rule in this case, the lease is not void because there is no provision which is in the nature of a chattel mortgage. If the option of purchase clause is void it does not affect the validity of the lease itself.

The revision of 1873 did not enlarge the scope of the act of 1872, in regard to conditional sales. It could not vitalize the void portions of the act. The marginal exposition, opposite sec. 1,922, limits the act to sales. The rule of construction was well stated by HUNT, J., in *The United States vs. Hughes*, 12 Blatch., 551: "The adoption of the old statute, accompanied by this marginal exposition, into

the revision, without change of language, entitles the marginal reading to more consideration than it would ordinarily possess.

This case also differs from the Illinois cases decided by this court. A lease with a provision that the rental should apply as part of the purchase price was held to be a sale, and the lease a chattel mortgage, in *Hervey et al. vs. R. I. Locomotive Works*, 3 Otto, 664.

A bill of sale of rolling-stock, with the proviso that the cars were to remain the property of the vendor, was held to be a chattel mortgage, good against the purchaser, in *Fosdick vs. Schall*, 9 Otto, 250.

In conditional sales the essence is a contract of sale, in which delivery of possession is made to the vendee, which he is to retain until the purchase price is paid, and when that is done, the title is to vest in the plaintiff. Upon failure of the vendee to pay, the vendor is authorized to retake possession.

Hutchings vs. Munger, 4 Barb., 399.

In our case there is no delivery of possession upon an agreement to sell, no forfeiture of possession for failure to pay the purchase price or any part of it, no provision for transfer of title at any specific time. There was no defeasable purchase by the railroad company. If it elected to buy, and the price was agreed upon and paid, the cars became its cars, with no right to repurchase whatever; it was to be an absolute, unconditional sale, putting an end to the lease. See—

Saxton vs. Hitchcock, 47 Barb., 225.

III.

The Lien of the Railway Mortgage.

It is attempted to subject the cars to the provision of the contract of February 29th, 1872, between the Davenport and St. Paul R. R. Co. and the Davenport Railway Construction Company, in which "the said party of the

second part agrees to furnish such rolling-stock as shall be necessary for local traffic. The same to be subject to the first-mortgage bonds."—(p. 31, printed transcript.)

Under this contract the rolling-stock to be furnished was such as was "necessary for *local traffic*." It is not proved that these cars were necessary for local traffic. The trustees attempted to prove this fact and failed.

The agreed statement of facts recites: "The said cars were all in use in the business of the railroad for their delivery, and were constantly passing in and for the road to Chicago and back, on the Northwestern rail, and in carrying and earning freight for the Davenport and St. Paul road, up to the time of the receiver's appointment." This is a distinct admission that they were used in through business, over other lines, instead of in local traffic. The lease itself recites that the cars were to be used "in the regular business of transportation over its own and other railroads"—inter-state traffic.

The class of rolling-stock properly included in the contract of February 29th, 1872, was engines and passenger cars, baggage cars and mail cars, used on the line of the road between its termini. It did not cover cars designed for inter-state traffic.

The contract between the Construction Company and the Davenport and St. Paul Railway Company bound the parties alone. No purchase of cars is proved to have been made under it; so that the mortgagees acquired no rights as against appellee under that contract.

The general rule in regard to rolling-stock is that stated by MILLER, J., in *Farmers' Loan and Trust Co. vs. St. Jo. and Denver City Railway Co.*, 3 Dillon C. C., 412: "In my opinion, rolling-stock and other property, strictly and properly appurtenant to the road, is part of the road and covered by the mortgage in question."

In Iowa, as shown by the statutory provisions heretofore cited, railway corporations, whose sole business is to operate a road, may exist. "That there can be a railway com-

pany which does nothing but construct the road, and a railroad company which does nothing but operate the constructed road, cannot be doubted."

The First National Bank of Davenport vs. Davis, 43 Iowa, 433.

It will not be pretended that a mortgage executed by a railway which has constructed its road, and leased it to an operating railway company, covers the rolling-stock of the latter company. The statute provides, in sec. 1,283, for mortgaging "its property and franchises;" and in sec. 1,285, that the rolling-stock and personal property of the company "properly belonging to the road and appertaining thereto, shall be deemed a part of the road."

This statute makes the cars owned by a railway part of its real estate. It does not subject leased cars to the same rule. It does not subject cars of a connecting road to the lien of the mortgage the moment they come upon its roadbed, nor lift the lien of the mortgage the moment they leave its rails. The cars of the Northwestern road engaged in freight traffic over both lines were not subject to the lien of appellants' mortgage.

The cars of the Western Car Company are governed by the same rule.

"A mere possession by the vendee carries with it no right or authority to transfer the title."

Coggill et al. vs. Hartford & New Haven R. R. Co., 3 Gray, 548.

A railroad being a public highway, every owner of cars on it is in possession of his own cars on what part soever of the track they may be; such cars are not in the possession of the company.

Trunick vs. Smith, 63 Penna. St., 18.

Even in cases of conditional sale, when the statute requires the contract to be recorded, to give effect against third parties, this court holds the contract to be "legal and valid as between the parties, but made with the risk, on the part

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Even in cases of conditional sale, when the statute requires the contract to be recorded, to give effect against third parties, this court holds the contract to be "legal and valid as between the parties, but made with the risk, on the part

of the vendor, of his losing his lien, if it works a legal wrong to third parties." That "the question, then, is whether these mortgagees occupy the position of third parties within the meaning of that term as used in the statute."

"They are in no sense purchasers of the cars. The mortgage attaches to the cars, if it attaches at all, because they are 'after-acquired' property of the company; but as to that class of property, it is well settled that the lien attaches subject to all the conditions with which it is incumbered when it comes into the hands of the mortgagor. The mortgagees take just such an interest in the property as the mortgagor acquired; no more, no less. These cars were 'loose property, susceptible of separate ownership and separate liens,' and 'such liens, if binding on the railroad company itself, are unaffected by a prior general mortgage given by the company and paramount thereto.'—(*United States vs. New Orleans Railroad*, 12 Wall., 362.) The title of the mortgagees in this case, therefore, is subject to all the rights of Schall under his contract."

Fosdick vs. Schall, 9 Otto, 251.

Trust deeds do not vest the legal title in the trustees.

Ingle vs. Culbertson, 43 Iowa, 271.

Orders of court for payment by the receiver for rolling-stock furnished under lease, were sustained in *Sage vs. Central R. R. Co.*, 9 Otto, 345.

For all supplies to the machinery department during the period the road is operated by the receiver, the persons who have furnished them have superior equities to those of the mortgagees, on the ground "that the net earnings of the road, while in the possession of the court and operated by its receiver, are not necessarily and exclusively the property of the mortgagees, but are subject to the disposal of the chancellor in the payment of claims which have superior equities, if such shall be found to exist."

Hale vs Frost, 9 Otto, 392.

These decisions dispose of the claim of appellants, that they were purchasers of the cars. The fact that they were neither execution nor attachment creditors is equally fatal to their claim.

IV.

The Receiver's Possession.

The court found upon the evidence that fifty-six of the ninety cars leased, while out of the jurisdiction of the court, and in the Northern District of Illinois, were replevined by appellee; that one stock-car and one box-car, purchased by the railway company to replace two leased cars destroyed, were subject to the lien of the trust deed; and that the thirty-two cars of the Western Car Company in the hands of the receiver should be delivered to appellee.

This decree recognizes the rule of chancery courts, that a receiver of a railroad takes possession of the property on the line of road for the real owners, and holds it subject to the orders of the court. Cars from other roads interchanging business do not become assets in his hands; nor do Pullman palace-cars, fast-line freight-cars, nor passenger and freight-cars used in through traffic, nor leased cars. If the receiver chooses to ratify former leases with the railroad company he can do so. If he does not ratify the leases, it is his duty to return the cars or submit to the court the question of rental. If he retains the cars without a specific agreement, the owner will be entitled to such fair and reasonable rental as the court may allow. His possession divests no rights.

Hills vs. Parker, 111 Mass., 510, 511.
Ellis vs. Boston, Hartford & Erie R. R. Co., 107 Mass., 1.

Prior to the filing of the bill of Meyer et al., the Western Car Company had applied to the court for payment of the rental agreed to in the lease, and for payment of the

amount then due from the company. The court refused to allow it. The lease was by that order of the court terminated. Appellee replevined its cars then in the State of Illinois. This was in March, 1875. The court, in its final decree, fixed upon that date as the time when its receiver was liable for the rental of the cars in its possession. Since that date the receiver has used the cars, and, by agreement of counsel, the court fixed the amount due. The question of the amount due from the receiver up to the date of the decree is not questioned here. The real issue decided was that the trustees had no ownership of nor mortgage lien on the cars, as alleged in their bills.

The second assignment of error is of the same nature, based on the allegation of the cross-bill that the lease was void in law because B. E. Smith and George H. French were stockholders and officers in the car comany, the construction company, and the railway company, and the lease was, therefore, void. As the construction company was not a party to the lease the allegation was not proved. The agreed statement admits "that when the contract of the 1st of October, 1873, was executed, B. E. Smith was president of the Western Car Company, director and president of the Davenport and St. Paul Railway Construction Company and stockholder in the Davenport and St. Paul Railroad Company; that at the same time George H. French was president of the Davenport and St. Paul Railroad Company, and secretary of the construction company."

This admission does not show that Smith owned any stock in the car company, or that French owned any stock in the railroad, car, or construction companies. A stockholder in a corporation who is an officer of another corporation may, as such officer, execute a contract with the corporation of which he is a stockholder. The contract is valid, if fair in terms. This is the rule in *Twin Lick Oil Co. vs. Marbury*, 1 Otto, 589.

Mr. B. E. Smith was asked if he knew of any fraud or concealment in making the contract, and answered :

"I do not. The contracts were made the same as with any other railroad company that we were leasing cars to, open and above-board and in good faith; known by parties and stockholders in both companies."—(*p.* 41, *Transcript.*)

As Smith was not a trustee, director, or officer of the railway company, he was not amenable to the rule that a person holding a trust relation in a corporation cannot make a contract with himself to its disadvantage.

The decree of the court below, we submit, is just, equitable, supported by the evidence, and should be affirmed.

R. G. INGERSOLL,
Counsel for Appellee.